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No. 03-__

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IN THE

Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE C. DEHOYOS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of pervasive state regulation of insurance ratemaking, the imposition of "disparate impact" liability under the Fair Housing Act, 42 U.S.C. § 3604, on insurance companies' use of race-neutral credit scoring and similar mechanisms in assessing risk and setting the price of insurance products is precluded by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

PARTIES TO THE PROCEEDING

Petitioners, who were defendants and appellants below, are The Allstate Corporation, Allstate Insurance Company, Allstate Texas Lloyd's, and Allstate Indemnity Company.

Respondents, who were plaintiffs and appellees below, are Jose C. DeHoyos, Eva Perez-DeHoyos, Georgia Harrison, Charles White, Sheryl H. Franks, and Martel Shaw. This case was brought as a nationwide class action, but no class has been certified.

CORPORATE DISCLOSURE STATEMENT

The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation. Allstate Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company. Allstate Texas Lloyd's, Inc., a Texas corporation, is the attorney-in-fact for Allstate Texas Lloyd's. Allstate Texas Lloyd's, Inc. is a wholly-owned subsidiary of Allstate Insurance Company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Allstate Corporation, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 345 F.3d 290. The opinion of the district court (App. 21a-29a) is unpublished, but is found at 2002 WL 1491650.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2003. A timely petition for rehearing was de-

nied on November 25, 2003. App. 31a-32a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

2. The Fair Housing Act, 42 U.S.C. § 3604, provides in pertinent part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin [or]
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin . . . .

STATEMENT

1. Credit Scoring and Insurers' Evaluation of Risk

This case involves a challenge under the Fair Housing Act (FHA), 42 U.S.C. § 3604, to a practice, known as credit scoring, that is commonly used by insurers to set prices for their products. In a perfect world, an insurer would know beforehand whether any individual policyholder would suffer a reimbursable loss. Because such clairvoyance is impossible in the real world, insurers attempt to predict the likelihood

that a particular policyholder will suffer such a loss by analyzing a wide variety of factors. These factors can be roughly divided into three categories: what, where, and who. The "what" category includes, for example, the model and year of a policyholder's automobile, or the size and construction of a policyholder's home; the "where" category includes the location of a policyholder's automobile or home, and the risk of loss from crime, fire, and weather associated with that location. The "who" category includes the prior loss experience of the policyholder, the policyholder's age and gender (for automobile insurance), the policyholder's health (for life insurance), and the number of persons residing with the policyholder (for homeowners insurance). Credit scoring fits squarely into the "who" category and is a logical extension of risk-rating mechanisms traditionally used by insurers.[1]

Numerous studies have endorsed the validity of credit scoring as a predictor of risk of loss. For example, a recent study commissioned by the Texas legislature found a strong correlation between credit history and the likelihood of experiencing an insurance loss.[2] Other studies have shown

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[1] Federal law has recognized the validity of credit scoring for many uses. The usefulness of such data for insurance purposes is reflected in the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, in which Congress authorized credit reporting agencies to share such data with insurers. 15 U.S.C. § 1681b. The FCRA also contemplates that insurers may take "adverse action" based upon credit information, including raising rates, § 1681a(k)(1)(B)(i), as long as notice is provided to the consumer, *see* § 1681m(a).

[2] Researchers at the University of Texas, studying 153,326 policies from Texas insurers, found that policyholders in the worst decile of credit score experienced losses 53% higher than the expected average, as compared to policyholders in the top decile of credit score, who incurred losses 25% less than the expected average. *See* Bruce Kellison et al., Bureau of Business Research, McCombs School of Business, The University of Texas at Austin, *A Statistical Analysis of the Relationship Between Credit History and Insurance Losses*, at 10-11 & Chart 6 (2003), http://www.utexas.edu/depts/bbr/bbr_creditstudy.pdf.

similar results.[3] Such empirical data confirm the commonsense conclusion that an insured's credit history may provide crucial information about the insured's risk of loss. As the Insurance Information Institute has noted, "[i]t is not surprising that financially stable individuals are more likely to exhibit stability in other aspects of their lives, whereas financial stress can lead to distractions or other behaviors that produce more losses[.]"[4]

Of course, it is entirely possible that credit scoring—like any other rating factor—may affect, in the aggregate, different groups in different ways at different times. More often than not, rating factors do affect some groups more than others. For example, when life insurers began to charge higher rates for smokers, average rates increased for men but decreased for women, because men were more likely to smoke than women. Similarly, charging higher rates for automobile or homeowners insurance in areas exposed to greater risk of loss may result in higher rates for groups that are disproportionately likely to live in those areas.

Increased precision in predicting the likelihood of loss benefits the general public. When insurers can predict with greater accuracy which policyholders are likely to suffer a loss, they are better able to ensure that no one pays more for insurance than his or her risk of loss warrants. The use of rate-setting factors that are shown to be effective in evaluat-

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[3] *See* Robert P. Hartwig & Claire Wilkinson, Insurance Information Institute, *The Use of Credit Information in Personal Lines Insurance Underwriting*, at 5-7 (June 2003), *available at* http://server.iii.org/yy_obj_data/binary/729782_1_0/Credit.pdf (collecting studies); James E. Monaghan, *The Impact of Personal Credit History on Loss Performance in Personal Lines*, Casualty Actuarial Society Forum (Winter 2000), http://www.casact.org/pubs/forum/00wforum/00wf079.pdf; Michael J. Miller & Richard A. Smith, EPIC Actuaries, LLC, *The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity* (June 2003), *available at* http://www.mdinsurance.state.md.us/documents/Ex9-EpicStudy.pdf.

[4] Hartwig & Wilkinson, *supra*, at 5.

ing risk of loss therefore works to the advantage of insurance sellers and insurance purchasers alike.

2. State Regulation of Insurance

a. Rate-setting and the factors used to set rates, including credit scoring, are at the heart of state regulation of insurance. As this Court has observed on numerous occasions, the business of insurance has been regulated by the States throughout our nation's history. *See, e.g., Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1955). In 1944, the Court held for the first time that insurance transactions fall within Congress's power to regulate commerce. *See United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Congress acted swiftly to restore state primacy in insurance regulation by enacting the McCarran-Ferguson Act (MFA) in the following year.

Section 1 of the MFA provides that "continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. Section 2(b) further provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance[.]" 15 U.S.C. § 1012(b). In enacting Section 2(b), "Congress ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 306 (1999).

State regulation of insurance is pervasive. Every State has in place an administrative regime regulating the provision of insurance. Each State has a department of insurance or similar agency. States regulate the kinds of policies that insurers may offer, as well as coverage levels and rates under policies.

Despite differences among these regulatory regimes, three goals are common to all.[5] First, state regulation is intended to ensure that rates are adequate. If an insurer charges rates that are too low in an effort to build market share, it may earn insufficient income to pay future claims. Because an insurer's collapse could have catastrophic consequences for policyholders, States require adequate rates to preserve insurers' solvency. Second, state regulation is intended to ensure that rates are not excessive. Third, States proscribe rates that are unfairly discriminatory. This rule is generally understood to prohibit differential treatment of applicants or policyholders who present similar risks of loss. The rule ensures that rates charged reflect actual differences in expected loses, expenses, or both. *See* Lee R. Russ, *Couch on Insurance* §§ 2.31, 69.12 (3d ed. 2003); Kathleen Ettlinger et al., *State Insurance Regulation* 29-30 (1995).

Balancing these competing goals necessarily requires policy judgments. The weight given to each policy consideration and the methods enlisted to further diverse regulatory purposes may vary widely among States. Moreover, because the spreading of risk ultimately affects all citizens of a State, state insurance regulation is based upon the public interest as a whole. Each State has designed an insurance-specific statutory framework to protect the public interest and has delegated to regulators the authority to make the necessary policy judgments. Indeed, the authority of state insurance regulators to supervise insurance ratemaking is often described as "legislative" or "quasi-legislative."[6]

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[5] In general, state systems of rate regulation vary as to whether insurers are allowed to set their own rates or required to use state-mandated rates, whether prior regulatory approval is necessary to use rates, and as to the type of regulatory filing that is required. Even if no filing or approval is required, the regulator may investigate rates and require their correction if they violate regulatory standards. *See* Kathleen Ettlinger et al., *State Insurance Regulation* 64 (1995).

[6] *See, e.g., Insurance Comm'r* v. *CareFirst of Maryland, Inc.*, 816 A.2d 126, 146 (Md. Ct. Spec. App. 2003); *Commonwealth ex rel. Chandler* v. *Anthem Ins. Cos.*, 8 S.W.3d 48, 52-53 (Ky. Ct. App. 1999); *State Com-*

b. Texas has a comprehensive regulatory regime governing insurance ratemaking.[7] The Texas legislature has prohibited unfair discrimination in insurance rates, *see* Tex. Ins. Code arts. 21.21-6, 21.21-8, and has vested the Texas Department of Insurance with broad enforcement powers, including the ability to impose penalties and to issue cease and desist orders, s*ee generally* Tex. Ins. Code §§ 82.001–84.051. Among other sanctions, the Commissioner of Insurance may direct the insurer "to make complete restitution to each Texas resident [or entity] that is harmed by a violation of, or failure to comply with, this code or a rule of the commissioner." Tex. Ins. Code § 82.053.

Under a statutory scheme in place until 2003, the Texas Department of Insurance had, with two exceptions, the sole and exclusive power and authority to fix the range of premium rates to be charged and collected by insurers for

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pensation Ins. Fund v. *Brown*, 38 Cal. Rptr. 2d 98, 103 (Cal. Ct. App. 1995); *Massachusetts Auto. Rating & Accident Prevention Bureau* v. *Commissioner of Ins.*, 453 N.E.2d 381, 394-395 (1983); *Berry* v. *Lindsay*, 182 S.E.2d 78, 82-83 (S.C. 1971); *cf. Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 589 (1945) ("Rate-making is essentially a legislative function.").

The Texas Supreme Court has struck down, as a violation of the separation-of-powers clause of the Texas Constitution, a statute that authorized courts, upon invalidating rates promulgated by state insurance regulators, to set their own rates as a remedy. *See Daniel* v. *Tyrrell & Garth Inv. Co.*, 93 S.W.2d 372, 375-376 (Tex. 1936); *see also State* v. *Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 530 (Tex. 1975) (" 'It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.' " (quoting *Interstate Com. Comm'n* v. *Railway Co.*, 167 U.S. 479, 499 (1897)).

[7] Because this lawsuit was brought as a putative nationwide class action, the insurance laws of all 50 States are relevant to the question of preemption under the MFA. The regulatory scheme of Texas is presented here for illustrative purposes, in the interest of brevity and because the named plaintiffs whose claims against petitioners are directly at issue reside in Texas. *See infra* p. 9 & n.11.

homeowners insurance in Texas.[8] *See* Tex. Ins. Code arts. 5.01, 5.01-2, 5.25 (art. 5.01-2 repealed 2003). Premiums were calculated from insurers' filed rates based on a rating manual of classification and territories promulgated or approved by the commissioner. *See id.* arts. 5.01, 5.01-2, 5.25. Insurers subject to direct rate regulation were required to charge, on a "file and use" basis, rates within a "flexibility band" of a benchmark rate promulgated by the Department in such a way as to yield rates that were "just, reasonable, adequate, and not excessive for the risks to which they apply, and not confiscatory." *See id.* art. 5.101. For all insurers, the Department bore responsibility for determining, on an annual basis, whether any rate rollbacks were necessary in order to ensure that rates were "adequate, not unfairly discriminatory, nonconfiscatory, and not excessive." *Id.* art. 5.131, § 3(c).

Sweeping insurance reform in 2003 updated the Texas insurance scheme and granted the Department further power to regulate all insurers. *See* Act of June 11, 2003, 2003 Tex. Sess. Law Serv., ch. 206 (Vernon) ("June 11 Act"). In the wake of the 2003 reforms, homeowners insurance rates are subject to prior approval until December 1, 2004, and are governed by a "file and use" system following that date. *See* Tex. Ins. Code arts. 5.13-2, 5.142. Any rating scheme may be enjoined by the Department if it is excessive, inadequate, unreasonable, or unfairly discriminatory. *See id.* arts. 1.02, 5.13-2, 5.26-1, 5.142, 5.144; June 11 Act, art. 6.

The Texas insurance reform of 2003 directly addressed credit scoring and made explicit what had been implicit in Texas for many years: the use of credit scoring, as one factor

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[8] "County mutual" and "Lloyd's plan" insurers were not bound by this range, although the Commissioner prescribed the form of their insurance policies and required an independent examination of their financial condition to assure solvency. *See* Tex. Ins. Code arts. 1.15A, 5.35, 17.25, 18.23 (arts. 17.25, 18.23 repealed 2003). Such insurers were, however, subject to the statutes that proscribed unfair discrimination in the provision of insurance. *See infra* pp. 18-19 & n.18.

in determining a policyholder's risk of loss, is permissible to ensure that all policyholders pay rates commensurate with their risk of loss. The 2003 law provides that insurers may use credit scoring to develop rates, rating classifications, or underwriting criteria, as long as the scoring system is based on sound actuarial principles and the use of credit scoring is disclosed to each applicant.[9] The law makes Texas one of at least 39 States that have passed laws providing for, and regulating, the use of credit scoring to calculate insurance rates.[10]

3. Proceedings Below

a. Respondents Jose C. DeHoyos and Eva Perez-DeHoyos, who are residents of Texas, allege that Allstate Corporation and its subsidiaries (collectively "Allstate") violated the FHA and 42 U.S.C. §§ 1981 and 1982 in setting premiums for homeowners insurance policies. Compl. ¶¶ 6, 79-96. The FHA claim rests principally on the contention that Allstate's use of race-neutral credit scoring programs to evaluate individuals' risk and to set the price of insurance products offered to individuals had an impermissible disparate impact on non-Caucasians. Compl. ¶¶ 91-96.[11] Respon-

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[9] The Texas law imposes several further conditions on the use of credit scoring: any action based upon a credit score that results in an adverse effect must be disclosed to the applicant; no decision may be made on the basis of credit scoring alone; and reasonable exceptions to the use of credit scoring must be provided for applicants whose credit information has been affected by catastrophic illness, unemployment, divorce, death of a close family member, or identity theft. The law mandates that all credit scoring models must be filed with the Texas Department of Insurance, and authorizes a study to determine "any disproportionate impact on any class of individuals, including classes based on income, race, or ethnicity, resulting from the use of credit, to the extent that information is readily available." Tex. Ins. Code art. 21.49-2U.

[10] *See* National Association of Mutual Insurance Companies, *Current State Laws and/or Regulations Governing Credit-Based Scoring* (last updated Dec. 2003), http://namic.org/state/creditregulations.asp .

[11] Four other individuals, who are residents of Florida and Texas, are also named plaintiffs against Allstate in this action. Those plaintiffs purchased only automobile insurance, not homeowners insurance, from

dents seek certification of a nationwide class consisting of all non-Caucasian persons who at any time had an ownership interest in a policy that was issued, serviced, or administered by Allstate based upon the common course of conduct described in their complaint. *Id.* ¶¶ 2, 66-78. Such a class would consist of "hundreds of thousands of persons." *Id.* ¶ 68. Respondents demand a jury trial. *Id.* at 22.

Allstate moved to dismiss, contending, *inter alia*, that respondents' FHA claims are precluded by Section 2(b) of the MFA, which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance[.]"[12] 15 U.S.C. § 1012(b). Allstate relied on this Court's decision in *Humana*, *supra*, which held that a federal law may be applied to insurance if and only if "[1] federal law does not directly conflict with state regulation, and [2] when application of the federal law would not frustrate any declared state policy or [3] interfere with a State's administrative regime." 525 U.S. at 310 (bracketed numerals added). Allstate argued that imposing disparate-impact liability based on insurance rates would interfere with the States' administrative regimes that govern those same rates, and thus would run afoul of the third prong of the *Humana* test. The district court denied the motion to dismiss, but certified the question for interlocutory appeal. App. 21a-29a; 1a-2a.

Allstate. Compl. ¶¶ 7-10. Their claims arise only under 42 U.S.C. §§ 1981 and 1982, which proscribe only intentional discrimination. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 185 (1989); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982). Their claims therefore do not implicate the disparate-impact theory under the FHA or the particularly disruptive effect that disparate-impact law would have on state insurance regulation.

[12] It is undisputed that the FHA does not "specifically relate[] to the business of insurance." *See* App. 8a.

b. A divided panel of the court of appeals affirmed, ruling that the MFA does not preclude disparate-impact liability under the FHA for an insurer's rates. App. 1a-19a.

The majority first pointed to prior appellate decisions that had approved the application of the FHA to homeowners insurance, notwithstanding the MFA. App. 5a-7a & n.4. Those decisions, however, involved alleged *intentional* racial discrimination in insurance rates. Furthermore, all but one of the decisions predated *Humana* and reflected an erroneous construction of the MFA, rejected in *Humana*, that federal law could be applied to insurance "whenever the federal law does not collide head on with state regulation," 525 U.S. at 309.

The majority then stated that Allstate had not "identif[ied] a state law or policy that would be impaired by the application of the federal statutes." App. 8a.[13] The court thereby elided the distinction between the second prong of the *Humana* test, which asks whether the federal law would "frustrate any declared state policy," and the third prong of the test, which involves a broader inquiry as to whether application of the federal law would "interfere with a State's administrative regime."[14] The majority also suggested that Allstate's argument based on the third *Humana* prong was nothing more than a "field preemption" argument to the ef-

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[13] The panel did note that Texas had recently passed a law regulating credit scoring, but dismissed the law as irrelevant because it was not retroactive, *see* App. 8a-9a & n.5, despite the fact that plaintiffs seek injunctive and prospective relief.

[14] For example, the majority stated that, to be ousted by the MFA, "[t]he approach of the federal statute must tread upon a declared policy goal of the state scheme," App. 11a, and then found the *Humana* test not satisfied in this case because Allstate had not pointed to any state law, regulation, or decision specifically "requiring or condoning" the credit-scoring practice challenged by respondents, App. 11a (brackets and ellipsis omitted); *see also* App. 15a-16a n.11 (dissent of Judge Jones, setting forth other places where majority conflated second and third *Humana* prongs and incorrectly required a direct conflict between federal law and state policy).

fect that federal law should not apply to insurance whenever a "state has a mechanism in place for performing an insurance-related function." App. 11a. But the court did not consider the potential for a clash between federal and state authorities posed by the application of disparate-impact liability to insurance. In particular, it did not consider that federal courts would be called upon to invalidate insurance rates approved or accepted by state insurance regulators as consistent with state actuarial standards (including prohibitions against discriminatory ratemaking) on the ground that some other rate structure might have a less disparate effect on non-Caucasians.

c. Judge Jones, in dissent, concluded that applying disparate-impact liability to insurance would interfere with state administrative regimes in a manner that would run afoul of the MFA. As Judge Jones stated, "a disparate impact claim goes to the heart of the risk adjustment that underlies the insurance business," because "[e]very insurer sets its prices according to the risk embodied in covering particular categories of customers." App. 13a. She further observed that state insurance commissions "are set up to regulate rates by overseeing the insurance companies' assessment of risks and differential pricing decisions," and that, "[n]o matter the exact statutory regime under which the commissions go about their business, they are called upon to balance, verify and make a quasi-legislative determination concerning the adequacy and appropriateness of rates." App. 14a.

Applying disparate-impact liability to insurance would interfere with state regulatory regimes, Judge Jones concluded, because respondents "are asking the federal courts to examine one thread from the regulatory fabric, while state insurance commissioners remain responsible for the whole." App. 14a. For example, in a disparate-impact lawsuit, "any *post hoc* declaration that credit scoring is impermissible will require a federal court to determine . . . what a fair and 'non-discriminatory' rate for the plaintiffs' policies would have been." App. 16a. Because that exercise will re-

quire the federal court to identify the proper insurance rate that should have been charged, "[a] more complete overlap with the state insurance commissions' pricing decisions is impossible to conceive." *Id.*

Judge Jones also stressed that, because Texas and other states do not permit private lawsuits to challenge insurance commissions' decisions about rates, allowing a federal disparate-impact lawsuit to go forward would also interfere with the "corrective procedures utilized by the states." App. 17a. She concluded by observing that "at the very core of the McCarran-Ferguson Act is the insulation of state regulation regarding the fixing of insurance rates from federal laws not specifically directed towards regulating insurance," App. 18a, and that "federal courts are not competent to tread in the essential domain reserved to state regulators," App. 18a-19a.

REASONS FOR GRANTING THE PETITION

Since this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the federal courts have wrestled with disparate-impact claims in contexts ranging from employment to educational testing. Extending the disparate-impact theory of discrimination to insurance, however, would be a momentous step. Grouping is fundamental to insurance, and the process of classification inherent in risk assessment must inevitably have an adverse effect on some groups of individuals. It is unavoidable that some categories of persons will present greater risk than others. As Judge Jones stated, "[e]very insurer sets its prices according to the risk embodied in covering particular categories of customers." App. 13a.

To protect the public interest, States have established administrative regimes to regulate insurance, under which regulators vigorously watch for and curtail unfair discrimination in risk assessment. These regulatory regimes can be extraordinarily complex, for they usually embody numerous (and sometimes competing) policy objectives. For example, most state regulatory regimes are designed to make certain

not just that insurers not overcharge customers, but also that insurers remain solvent over the long term in order to pay claims in the far future. Charging too little, or too little to the wrong categories of customers, can be as damaging as charging too much.

Disparate-impact claims under federal civil rights laws such as the FHA cannot be reconciled with the States' comprehensive system of insurance regulation. The FHA was not designed for application to insurance ratemaking, and the extension of disparate-impact liability to insurance under federal law would work a dramatic and disruptive change in the way that insurance rates are regulated. Federal courts would be called upon to invalidate insurance rates and to set aside rate structures that state regulators had approved or accepted in the exercise of their quasi-legislative authority—including rate structures that state regulators had concluded did not result in unfair discrimination under state insurance law. Moreover, in fashioning any remedy, federal courts would unavoidably become entangled in the States' carefully calculated administrative regimes for overseeing insurance rates. A federal court's conclusion that an insurer's use of a particular factor to assess risk had resulted in an impermissible disparate impact would require the insurer to develop an alternative mechanism of risk assessment with a less disparate impact. Any such alternative mechanism, however, would necessarily have an adverse impact on some other group that might well implicate, and possibly conflict with, other state insurance policies.

Fortunately, Congress has anticipated the possibility that the application of federal law might interfere with state insurance regulation in such a manner, and has acted to preclude it. Section 2(b) of the MFA provides that federal law shall not be construed in such a manner as to "impair" any state law that regulates insurance. As this Court held in *Humana*, this prohibition against "impairment" of state insurance regulation includes a bar against applying federal law to insurance if federal law would "interfere with a State's administrative regime." That is exactly this case.

Given the enormous disruption of state insurance regulation that will follow if the disparate-impact theory of liability under federal civil rights laws is extended to insurance, the Court should grant review to make clear that the MFA bars the application of disparate-impact claims to insurance.[15]

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[15] The court of appeals apparently decided this case on the assumption that respondents may state a claim under the FHA (a) on a disparate-impact theory and (b) concerning the pricing of homeowners insurance. This Court has expressly reserved the question whether disparate-impact claims may be brought at all under the FHA, *see Town of Huntington, N.Y.* v. *Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam), but the Fifth Circuit has held that such claims may be brought, *see Simms* v. *First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996). In addition, this Court has not decided whether the FHA covers the provision of homeowners insurance, but the Department of Housing and Urban Development (HUD) has promulgated a regulation applying the FHA (or, at a minimum, its prohibition against *intentional* discrimination) to insurance. *See* 24 C.F.R. § 100.70(d)(4).

Two courts of appeals have held the FHA may be applied to insurance. *See Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992). Both courts, however, expressly declined to decide whether insurers may be subjected to *disparate-impact* liability under the FHA. *See Nationwide*, 52 F.3d at 1362-1363; *NAACP*, 978 F.2d at 290. To our knowledge, HUD, which administers the FHA, has never argued in litigation that a disparate-impact claim may be brought with respect to insurance, and in *Nationwide*, the Sixth Circuit relied on the fact that HUD had never applied disparate-impact analysis to insurance to conclude that a challenge brought by insurers under the MFA to the possibility that HUD might do in the future was unripe. 52 F.3d at 1362-1363.

Much of our criticism of the extension of disparate-impact law to insurance could be framed as an argument that such a claim should not be recognized under the FHA. In the end, however, it is difficult if not impossible to separate the question whether such a claim may be stated under the FHA from whether it is preempted by the MFA. The uniquely disruptive potential of disparate-impact liability in the insurance context shows that that theory of liability should not be applied to insurance under the FHA; the same threat of disruption shows that Congress precluded application of disparate-impact liability to insurance in the MFA.

I. DISPARATE-IMPACT LIABILITY IN THE INSURANCE CONTEXT PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

It is difficult to overstate the dramatic effect on insurance, and on state regulation of insurance, that would result from extension of disparate-impact liability to the provision and pricing of insurance. Insurers set rates based upon risk, and because they cannot as a practical matter establish the risk for each individual, they have traditionally relied on the risk characteristics of groups. As Judge Easterbrook has explained, "[i]nsurance works best when the risks in the pool have similar characteristics," and "[t]o curtail adverse selection, insurers seek to differentiate risk classes with many variables." *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992).

In a society where risk is not distributed equally, efforts designed to measure risk will inevitably have disparate effects on various groups. Given residential housing patterns and the uneven distribution of wealth and risk in the United States, it is possible that some of those measures, even if entirely race-neutral in both form and intent, may have disparate effects on non-Caucasians. Thus, under federal disparate-impact law, there may well be circumstances in which a plaintiff can establish a disparate impact sufficient to shift the burden to the defendant insurer to demonstrate that its methods of evaluating risk are supported by a "business necessity." Even once the insurer makes that showing, the plaintiff still may prevail by showing that the insurer could employ an alternative method of rate-setting that would meet its business needs while causing a less disparate impact on non-Caucasians. *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). The result is foreseeable: extensive litigation after which federal courts may require insurers to alter their state-sanctioned rate structures in order to re-

duce the adverse effect of those structures on non-Caucasians in the aggregate.[16]

Such a result would work a revolution in the regulation of insurance in this country. Whether an insurer's rates are actuarially justified, and whether those rates unfairly discriminate within or against any group, are issues squarely within the province of state insurance regulators. If federal courts and lay jurors[17] were to become involved in such determinations, they would have to master a complex body of actuarial analysis best reserved for expert state regulators (and, since this case has been brought as a nationwide class action, to do so for all 50 States). Even if the insurer could demonstrate that the challenged factor is justified by its business needs, the jurors would still have to evaluate the plaintiff's proffer of an alternative rate-setting method to determine, based inevitably upon speculation, whether that method would both reduce the disparate impact and comparably serve the insurer's business needs in a way consistent with the requirements of state insurance law.

There is no reason to believe that credit scoring will be the only rating factor to face a disparate-impact challenge. Many factors used in ratemaking for homeowners insurance—ranging from geographic location to type of residence to number of residents—may have a disparate impact on particular racial or ethnic groups. Every such factor is ripe

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[16] Although our analysis focuses on disparate-impact claims arising under the FHA, analogous claims arising under other statutes may also interfere with state administrative regimes in violation of the MFA. By requiring no proof of intentional discrimination, yet inviting a searching reexamination of the actuarial justification of an insurer's state-sanctioned ratemaking methodology, disparate-impact claims (or their equivalents) are inherently disruptive. For this reason, the Third and Seventh Circuits have held that certain claims arising under the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, contravene the MFA. *See infra* pp. 26-28.

[17] Plaintiffs have demanded a trial by jury, which must be granted upon the request of either party in an action for damages under the FHA. *See Curtis* v. *Loether*, 415 U.S. 189, 192 (1974).

for a potential challenge, and upon a showing of a differential effect, an insurer would be forced to justify its use of any such factor and the rates calculated thereby. If a court enjoined the use of one factor to evaluate risk, an insurer might seek to use other factors, but those alternative factors in turn could be challenged in subsequent lawsuits. Indeed, a state regulator could prohibit use of one factor in favor of a second factor, only to watch as a federal court then barred the use of the second factor. In this way, as Judge Jones observed in dissent, a federal court that focuses on a "single thread" could unwittingly unravel the "entire fabric" of insurance regulation. App. 14a.

Worse still, the judge and jury might upset policy judgments appropriately crafted by state legislatures and regulators. Insurance is regulated by the States as a public good; state regulators balance the interests of numerous sectors of society in determining whether rates are lawful. A federal court entertaining a disparate-impact suit, however, has no broad warrant to consider the public interest; disparate-impact litigation focuses on the legal rights of the particular individuals before the court. Hence, a court applying disparate-impact law might well enjoin the use of a rating factor that state regulators have approved or accepted precisely because it benefits the general public by ensuring that those who pose a low risk of loss pay commensurately low rates. By forcing a reallocation of rates in order to reduce their disparate impact on non-Caucasians, the court could effectively force low-risk consumers to pay more than is warranted.

Precisely because insurance is a public good, the States are actively involved in combating insurance discrimination. Every State has laws that specifically address unfair discrimination in the provision of insurance. Texas is no exception, and its law clearly *excludes* this type of disparate-impact suit. Article 21.21-6 of the Texas Insurance Code prohibits unfair discrimination in insurance practices because of race, color, religion, national origin, age, gender, marital status, geographic location, or disability. Tex. Ins.

Code art. 21.21-6, § 3. The statute provides that discrimination is not unfair if "based upon sound underwriting or actuarial principles reasonably related to actual or anticipated loss experience," *unless* the discrimination is on the basis of race, color, religion or national origin. *Id.* § 4(a). This provision clearly indicates that the statute reaches only disparate *treatment*, because the actuarial defense is an insurer's only means of defeating a disparate-impact claim once a differential effect upon a protected class is shown. If an insurer could not use this defense in cases alleging disparate impact on the basis of race, color, religion, or national origin, then a plaintiff would automatically win merely by showing that the challenged practice affected one such group more than another. The possibility of such an absurd result clearly demonstrates that Texas' prohibition of unfair discrimination does not provide a disparate-impact cause of action.[18]

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[18] Indeed, Article 21.21-6 does not provide a private right of action of *any* type. Instead, its enforcement is entrusted to state regulators. *See Perez ex rel. Perez* v. *Blue Cross Blue Shield of Texas, Inc.*, --- S.W.3d ---, 2003 WL 22964281, at *5-*6 (Tex. Ct. App. Dec. 18, 2003).

Texas also has a statute that prohibits "unfair discrimination between individuals of the same class and of essentially the same hazard." Tex. Ins. Code art. 21.21-8, § 2. As Texas courts have noted, " '[w]hile article 21.21-6 prohibits discrimination based on differential treatment of members of *different classes*, article 21.21-8 prohibits discrimination based on differential treatment between individual members *within the same class*.' " *Perez*, 2003 WL 22964281, at *6 (quoting *Cortez* v. *Progressive County Mut. Ins. Co.*, 61 S.W.3d 68, 73 (Tex. Ct. App. 2001), *pet. granted, judgm't vacated pursuant to settlement*) (emphases in *Cortez*). Article 21.21-8 "is the latest in a long series of Texas statutes designed to prohibit *disparate treatment* between insureds of essentially the same risk." *Cortez*, 61 S.W.3d at 74 (emphasis added).

In addition to these laws specifically targeting insurance discrimination, Texas has its own fair housing act, *see* Tex. Prop. Code §§ 301.001 *et seq.*, and also has a regulation that, like HUD's regulation, applies the act to homeowners insurance, *see* 40 Tex. Admin. Code § 339.4(b)(4). It would be improper to assume, however, that the Texas fair housing law would be extended to prohibit disparate racial impacts in the provision and pricing of homeowners insurance. Indeed, it is uncertain that Texas' fair housing law permits recovery under a disparate-impact theory at all. Given that Texas—unlike the federal government—has created a wholly separate

Moreover, Texas has, subsequent to the filing of this lawsuit, enacted a law that *explicitly* permits credit scoring under certain conditions. *See supra* pp. 8-9. The court of appeals concluded that that law was irrelevant to this case because it was "not retroactive." App 8a-9a n.5. But this suit illustrates why even prospective relief—which plaintiffs also seek—would deeply disrupt state insurance regulation. Application of the FHA to enjoin the use of credit scoring in the future would "frustrate a[] declared state policy" in the most basic way and would "directly conflict with state regulation." Thus, even if respondents could recover damages based on petitioners' past use of credit scoring, the MFA would plainly prohibit the courts from applying the FHA to prohibit the prospective use of credit scoring.

Just as the determination of *liability* would interfere with state administrative regimes, so too would the allocation of *remedy*. Many States, for example, have adopted some version of the filed rate doctrine, which bars any action for damages based on an allegation that a rate approved by a regulator is excessive, inadequate, or discriminatory.[19]

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body of anti-discrimination law specifically targeting insurance, it is highly unlikely that Texas would impose disparate-impact liability under the state fair housing law to homeowners insurance in such a radical fashion. Texas is free to do so, of course, but the point of the MFA is that such broad policy determinations should be made by state officials, not federal courts.

[19] *See, e.g., Birmingham Hockey Club, Inc.* v. *National Council on Compensation Ins., Inc.*, 827 So. 2d 73, 83 n.11 (Ala. 2002); *American Bankers' Ins. Co. of Fla.* v. *Wells*, 819 So. 2d 1196, 1203-1204 (Miss. 2001); *N.C. Steel, Inc.* v. *National Council on Compensation Ins.*, 496 S.E.2d 369, 372-374 (N.C. 1998); *Prentice* v. *Title Ins. Co. of Minn.*, 500 N.W.2d 658, 662-663 (Wis. 1993). As this Court has noted, the goals of the filed rate doctrine are two-fold: preventing the rate discrimination that would ensue if individual plaintiffs were allowed to challenge rates, *see, e.g., Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981), and avoiding judicial entanglement in the rate-setting process, *see, e.g., Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951). In those States that adhere to the filed rate doctrine, the interference with the state administrative regime caused by disparate-impact suits would be particularly great. Those States have deliberately crafted

Damages awards would also conflict with policies of many States that allow only prospective adjustments in judicial challenges to ratemaking to ensure that rate adjustments do not imperil insurers' overall revenue or ability to cover losses.[20]

For all these reasons, the nationwide extension of disparate-impact liability to insurance under the FHA would be a momentous policy change that ought not be undertaken without clear warrant from Congress, and may not be forced upon the States in light of the MFA. The disparate-impact theory of liability, originally crafted by courts to combat racial and gender disparities in employment caused by facially neutral hiring criteria such as intelligence testing, educational requirements, and size and strength thresholds, does not sensibly translate to the context of insurance rate-setting. If Congress wishes to take the dramatic step of enacting disparate-impact liability for insurers, it may do so in a law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). In the absence of such a law, the courts must give controlling effect to Congress's judgment, reflected in the MFA, that evaluations about the actuarial justification of insurers' practices should remain the province of state regulators rather than federal courts and jurors.

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an administrative scheme that assigns insurance rate challenges to the state insurance agency, which is most competent to handle such challenges, and not a court lacking expertise in insurance ratemaking.

[20] *See, e.g.*, N.C. Gen. Stat. § 58-36-20(b); *In re Surcharge Classification 0133 By Delaware Compensation Rating Bureau, Inc.*, 655 A.2d 295, 299-305 (Del. Super. Ct. 1994), *aff'd*, 655 A.2d 309 (Del. 1995) (Table); *Associated Indus. of Mass., Inc.* v. *Commissioner of Ins.*, 525 N.E.2d 670, 675 (Mass. 1988); *Caldwell* v. *Insurance Co. of North America*, 218 S.E.2d 754, 758 (Ga. 1975).

II. THE COURT OF APPEALS' DECISION, PERMITTING APPLICATION OF FEDERAL DISPARATE-IMPACT LAW TO INSURANCE, IS ERRONEOUS UNDER THE MCCARRAN-FERGUSON ACT

The MFA "grant[s] the States broad regulatory authority over the business of insurance." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 505 (1993). Every State has exercised that authority by requiring licensing of insurers and regulating the kinds of policies that insurers may offer. Each State also has a dedicated agency supervising insurers and retains power to regulate the rates that insurers may charge. The MFA is designed to protect this system, which has served the nation well, from unwarranted and unintended federal disruption. In particular, the MFA "seeks to protect state regulation primarily against inadvertent federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996) (emphasis omitted).

The MFA "precludes application of a federal statute in face of state law 'enacted . . . for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana*, 525 U.S. at 307 (quoting 15 U.S.C. § 1012(b)) (brackets and ellipsis in original). In *Humana*, the Court rejected the argument that "impair" is "interchangeable with 'invalidate' and 'supersede.' " *Id.* at 308 (selected internal quotation marks and brackets omitted). Rather, the Court interpreted Section 2(b) of the MFA to allow the application of federal law if and only if (1) the federal law "does not directly conflict with state regulation," (2) application of the law would not "frustrate any declared state policy," and (3) application of the law would not "interfere with a State's administrative regime." *Id.* at 310. In crafting this three-part test, the Court disapproved lower court decisions holding that federal law was displaced under the MFA only where it directly con-

flicted with state law. Emphasizing that the MFA broadly proscribes "interfere[nce] with a State's administrative regime," the Court rejected the notion that "Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 309-310.

The court of appeals in this case gave short shrift to the third prong of the *Humana* test. The panel suggested that, because petitioners had not identified a specific "state law or policy that would be impaired by the application of the federal statutes, it is impossible for them to prevail on the third *Humana* prong, i.e., a finding of impairment caused by the application of the federal law." App. 8a. *Humana*, however, quite clearly does *not* require a showing that application of the federal law would impair a specific substantive state law or policy. Indeed, the Court rejected that position in *Humana* when it ruled that federal law also may not be applied if it would "interfere with a state administrative regime," and disapproved earlier decisions holding that only a direct conflict between federal and state law would suffice to preclude application of federal law. Elsewhere, the panel simply ignored the third prong, such as where it summarized the *Humana* preemption test as "turn[ing] on one of two axes: (1) the existence of an express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal." App. 3a.

Where the panel did specifically address the third *Humana* prong, it incorrectly understood petitioner to argue that the third prong amounts to "field preemption," such that federal law may not be applied to insurance "if the state has a mechanism in place for performing an insurance-related function and the federal law enters that regulatory arena." App. 11a. Plainly, the third prong of *Humana* does not hold that the mere existence of state regulation of insurance is sufficient to oust federal law; if that were the case, then the two other prongs would be surplusage. The third prong requires interference with the state administrative

regime—in essence, a hampering of the authority of the State to regulate insurance in the public interest.

Had the court of appeals properly applied this third prong, it would have concluded that application of a federal disparate-impact claim to insurance would unavoidably (and impermissibly) interfere with the States' ability to regulate insurance to benefit the public—in stark contrast to the minimal federal intrusion in *Humana*.[21] First, because credit scoring directly implicates the calculation of insurance rates (unlike the simple fraud at issue in *Humana*), it squarely "affects the relation of insured to insurer and the spreading of risk—matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern." *Barnett Bank*, 517 U.S. at 39.

Second, as we have explained, extension of the disparate-impact theory of liability to insurance would require federal courts and juries to reexamine insurers' actuarial assumptions in every case, and could lead them to invalidate the legislatively-mandated policy judgments of state insurance regulators who had accepted or expressly approved insurers' rate structures under state law. Moreover, if a federal jury were to reject an insurer's rate structure on the ground that some other rate structure might exert a less disparate effect upon non-Caucasians, it would impinge upon state regulators' duty to consider the interests of *all* state citizens. Such intervention by the federal courts could yield rate adjustments that would harm low-risk policyholders. *See supra* pp. 17-18.

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[21] In *Humana*, the Court held that the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, did not interfere with Nevada's administrative regime. *Humana* involved garden-variety fraud—a scheme to overbill policyholders by concealing large discounts on the insurer's portion of hospital charges for care provided to policy beneficiaries. Although the Nevada Insurance Commissioner had authority to investigate charges of insurance fraud, federal law posed no threat to the efficaciousness of the state regulatory mechanism because federal and state law differed only slightly, and only with respect to the type of recovery permitted. *See Humana*, 525 U.S. at 311-313.

Third, the remedies available in such a federal lawsuit are quite different from the remedies customarily provided by the several States in the insurance context. In *Humana*, although the federal and state remedies available for fraud were not identical, the Court emphasized certain fundamental similarities: (1) both state and federal law permitted private rights of action, and (2) damages available under state law were comparable to, and indeed potentially greater than, the damages available under the federal law. 525 U.S. at 312-313. Neither is the case here. Rather, numerous States explicitly forbid private rights of action to challenge rate-making decisions, and channel such challenges in the first instance to state regulators. The damages that respondents seek are also incompatible with state laws that expressly foreclose such relief. *See supra* pp. 20-21.

III. Other Circuits Have Recognized That Subjecting Insurers To Disparate-Impact Liability Under Federal Law Would Contravene The McCarran-Ferguson Act

The court of appeals stated that five circuits have determined "that the MFA does not prevent the application of federal anti-discrimination laws to the insurance industry." App 5a. In fact, no other circuit has held that the FHA establishes *disparate-impact* liability in the insurance context. Every case cited by the majority involved either claims of *intentional* discrimination, *see Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992); *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), or allegations of fraud, *see Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir. 1995). Only one decision cited by the majority discussed the propriety of disparate-impact liability under the FHA at all, and only to observe that this theory of liability is entirely ill-suited to the insurance context. *See NAACP*, 978 F.2d at 290-291 (remarking that "the

nature of insurance" implies that "[r]isk discrimination is not race discrimination").[22]

Far from following the lead of other circuits, the court of appeals' decision conflicts with decisions of two other courts of appeals that have recognized that disparate-impact claims cannot be applied to insurance under federal anti-discrimination law without running afoul of the MFA. In *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), the Seventh Circuit was asked to determine whether an insurer's caps on medical insurance policy benefits for AIDS care violated the anti-discrimination rule of Section 302(a) of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12182(a), which does not require proof of intentional discrimination against disabled persons. As the Seventh Circuit recognized, applying that ADA provision to insurance caps would require the federal court to determine whether caps on disabling conditions were "actuarially sound and consistent with principles of state law." *Doe*, 179 F.3d at 564. For that reason, the court concluded that such an application of the ADA would fail the third prong of the *Humana* test and thus would contravene the MFA. *Id.* at 563-565. As Judge Posner observed: "[s]tate regulation of insurance is comprehensive and includes rate and coverage issues, so if federal courts are now to determine whether caps on disabling conditions (by no means limited to AIDS) are actuarially sound and consistent with principles of state law they will be stepping on the toes of state insurance commissioners." *Id.* at 564 (citation omitted).

The court of appeals in *Doe* stressed that the MFA does not affect federal civil rights laws insofar as such laws forbid *intentional* discrimination; rather, the MFA preempts such laws when their application would require the federal court to reexamine the actuarial justification of the insurer's state-sanctioned decisions:

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[22] The *Nationwide* case also discussed the application of disparate-impact liability to insurers under the FHA, but dismissed a challenge to such an application of the FHA as unripe. *See supra* p. 15 n.15.

> It is one thing to say that an insurance company may not refuse to deal with disabled persons; the prohibition of such refusals can probably be administered with relatively little interference with state insurance regulation .... It is another thing to require federal courts to determine whether limitations on coverage are actuarially sound and consistent with state law. Even if the formal criteria are the same under federal and state law, displacing their administration into federal court—requiring a *federal* court to decide whether an insurance policy is consistent with *state* law—obviously would interfere with the administration of the state law. The states are not indifferent to who enforces their laws.

Id. (emphases in original).

The Third Circuit has similarly held that the MFA forbids applying federal law to insurance where (as here) to do so would require the court to decide whether insurance disparities were actuarially justified. In *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), the Third Circuit ruled that the MFA precludes applying the ADA to invalidate differential caps for mental and physical health care benefits. Because interpreting the ADA in this way would require insurers to prove the actuarial soundness of their insurance plan, the court held that such a requirement—which would apply equally to *any* disparate-impact claim in the insurance context—would produce "a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." *Id.* at 612. The court stressed that "requiring insurers to justify their coverage plans elevates this court to the position of super-actuary. This court is clearly not equipped to become the watchdog of the insurance business[.]" *Id.*

Even though the *Doe* and *Ford* cases arose under the ADA and not the FHA, their inconsistency with the decision below is patent and significant. The Third and Seventh Cir-

cuits have recognized that, in light of the MFA, federal law should not be construed in a manner that will lead to federal courts routinely reexamining the actuarial assumptions of insurers' rate structures, especially where those structures are subject to review by state regulators. The Fifth Circuit has failed to apprehend this important lesson. The Fifth Circuit's decision also casts a significant shadow of uncertainty over a race-neutral insurance tool that has gained broad acceptance as a strong predictor of risk of loss, and thus a valid method of appropriately tailoring insurance rates to reflect each policyholder's risk of loss—no more and no less. On a matter of such importance to the insurance industry in particular and to the national economy more generally, this Court's review of the decision below is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE C. DEHOYOS; EVA PEREZ-DEHOYOS; GEORGIA HARRISON; CHARLES WHITE; SHERYL H. FRANKS; MARTEL SHAW, PLAINTIFFS-APPELLEES,

v.

ALLSTATE CORPORATION; ALLSTATE INSURANCE COMPANY; ALLSTATE TEXAS LLOYD'S; ALLSTATE INDEMNITY COMPANY, DEFENDANTS-APPELLANTS.

No. 02-50721

Sept. 3, 2003

[345 F.3d 290]

Appeal from the United States District Court for the Western District of Texas.

Before DAVIS, JONES and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judges:

This interlocutory appeal presents a preemption question. Six members of a proposed class of non-Caucasian insurance customers instigated this Civil Rights action against Appellants Allstate Insurance Corp. *et alia* (Appellants or Allstate), alleging that Allstate engages in racially discriminatory business practices in violation of 42 U.S.C. §§ 1981 and 1982 of the Civil Rights Act of 1866, and in violation of the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.* Appellants filed a Rule 12(b)(6) motion to dismiss, arguing that the anti-preemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), precludes application of federal anti-discrimination laws to the controversy at bar. The district court denied the motion, finding that the application of the

civil rights statutes was not precluded by the McCarran-Ferguson Act, but simultaneously granting leave for this interlocutory appeal. We find that the McCarran-Ferguson Act does not bar Appellees' claims, and consequently we affirm the ruling of the district court.

I.

Appellees are six non-Caucasian Allstate policyholders who instigated this action alleging racially discriminatory pricing practices on the part of Appellants Allstate, *et al.* in violation of 42 U.S.C. §§ 1981 and 1982 of the Civil Rights Act of 1866 and in violation of the FHA, 42 U.S.C. § 3601 *et seq.* Specifically, Appellees allege that Allstate uses a "credit-scoring system" to target non-Caucasian customers for the sale of more expensive insurance policies than those directed at Caucasian customers. Similarly, the credit-scoring system is allegedly used to "place" non-Caucasian applicants into more expensive policies than those polices [sic] into which Caucasian applicants are placed.[1]

Appellees filed a three-count class action complaint. Appellants filed a motion to dismiss, arguing, *inter alia*, that Appellees' **[294]** claims are preempted by the McCarran-Ferguson Act. The district court denied the motion to dismiss in all regards. However, at the conclusion of its memorandum opinion, the district court noted that the order involved "controlling questions of law as to which there are substantial grounds for difference of opinion." The district court went on to suggest, *sua sponte*, that it would "look favorably upon a properly and timely filed motion for leave to file an interlocutory appeal." Appellants so filed, and that interlocutory interrogatory is now before this Court. *See* 28 U.S.C.A. § 1292. The preemptive effect of the McCarran-Ferguson Act constitutes the sole point of appeal.

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[1] The dissent invites us to label Appellees' claims under §§ 1981 and 1982 a diversion and to comment on the merits of those claims. We decline to go beyond the preliminary questions presented by this interlocutory appeal.

II.

Where, as here, a district court's ruling on a 12(b)(6) motion to dismiss is based entirely on conclusions of law, this Court reviews that determination *de novo*. *See Malina* v. *Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993). The sole issue before this Court is whether the McCarran-Ferguson Act precludes the application of §§ 1981 and 1982 of the Civil Rights Act of 1866 and the FHA to the insurance pricing schemes at issue here. The McCarran-Ferguson Act (MFA) provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.[2]

15 U.S.C. § 1012(b).

A. *Humana Inc.* v. *Forsyth*

The Supreme Court outlined the framework in which MFA preemption questions are to be addressed in *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999). In *Humana*, the Court reviewed whether the application of RICO in an insurance context was preempted by the MFA. In finding that RICO was not preempted by the MFA, the Court expressly rejected the view that the MFA authorized a state-supremacy "field preemption" approach to the application of federal law to the insurance industry. Instead, the Court emphasized that MFA preemption is to be examined within a "conflict preemption" rubric, and that, as such, the analysis will turn on one of two axes: (1) the existence of an express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal. Moreover, the Court rejected an implicit presumption against the application of federal law in insurance contexts, stating instead that federal law is to be

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[2] The Act goes on to expressly exempt the Sherman Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914).

applied in an insurance context where it can be applied in harmony with state law.

Additionally, the *Humana* Court found that RICO could be applied in harmony with the state law because, *inter alia*, the federal law did not proscribe conduct that the state insurance laws permit; the existence of different remedial regimes does not constitute an impairment of the state regulatory scheme; the federal law augmented and advanced state regulatory goals; and the federal law did not frustrate a *particular* and *declared* state regulatory policy.

In sum, in extremely clear and specific language the Court identified the following **[295]** three MFA preemption threshold requirements: (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede that state law.[3]

We have not yet had occasion to pass upon the MFA preemption standard outlined by *Humana* within the context of applying § 1981, § 1982, or the FHA. However, this Court did recently consider MFA preemption in the context of the Federal Arbitration Act, 9 U.S.C. § 4 (FAA). In *American Heritage Life Insurance Co.* v. *Orr*, 294 F.3d 702 (5th Cir. 2002), we reviewed and rejected a challenge to the application of the FAA in an insurance context:

> The test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by the ap-

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[3] With similar clarity the *Humana* Court went on to articulate the following MFA "impairment" standard:

> [1] When federal law does not directly conflict with state regulation, and [2] when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Id. at 307, 310, 119 S. Ct. 710.

> plication of federal law. *Appellants fail to identify any statute that would be impaired, invalidated, or superseded by the application of the FAA.* Instead, Appellants try to perpetrate a judicial end-run by asserting that an attorney general's opinion or insurance department's regulatory, administrative policy is the functional equivalent of a state law relating to insurance, thereby triggering the provisions of the Act. Appellants' arguments are without merit.

Id. at 708. (emphasis added) (internal citations and quotation marks omitted). Thus, in *American Heritage* this Court concluded that MFA preemption would not be found merely because the state has a mechanism in place for regulating insurance contracts, nor could the state's putative disfavor of arbitration in the insurance context serve as a sufficient ground upon which conflict with the FAA could germinate. We found instead that

> [t]he party seeking to avail itself of the [McCarran-Ferguson] Act must demonstrate that application of the FAA would invalidate, impair, or supersede a particular *state law* that regulates the business of insurance.

Id. (emphasis in original).

Moreover, several of our sister circuits have passed squarely upon the question of MFA preemption with respect to § 1981, § 1982, or the FHA. Every circuit that has considered the question has determined that federal anti-discrimination laws may be applied in an insurance context, even where the state insurance agencies have mechanisms in place to regulate discriminatory practices. Specifically, the Eleventh, Seventh, Fourth, Sixth, and Ninth Circuits all have determined that the MFA does not prevent the application of federal anti-discrimination laws to the insurance industry.[4]

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[4] *See Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001); *NAACP* v. *Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992);

[296] In *Moore* v. *Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001), the Eleventh Circuit considered a challenge to the application of §§ 1981 and 1982 to allegedly racially discriminatory "red-lining" insurance practices. The Eleventh Circuit upheld the application of the federal anti-discrimination laws despite the fact that Alabama law purportedly implicitly authorized racially discriminatory practices which have an "actuarial basis." The Eleventh Circuit rejected the contention that allowing the application of federal civil rights statutes would frustrate or interfere with Alabama's policy of allowing discriminatory practices which were based on actuarial reality:

> We are asked to assume that the abolition of one form of discrimination, as codified in section 27-11-12, amounts to a clear declaration by the state that all other forms of discrimination, however invidious, are acceptable. We cannot construe Alabama's scheme of insurance regulation in such a formalistic and narrow way. *Absent more convincing evidence that racial discrimination in the insurance context is an integral part of Alabama's regulatory scheme, Liberty National's argument must fail.*
>
> . . . .
>
> . . . *[W]e . . . cannot conclude that Alabama intended to condone racial discrimination in its scheme of insurance regulation.* We therefore see no inconsistency between the state's interest in

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Mackey v. *Nationwide Ins.*, 724 F.2d 419 (4th Cir. 1984) (application of FHA in insurance context would not impair or supersede any state law, although North Carolina forbids discriminatory rates in the insurance business); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995) ("We conclude that the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede Ohio insurance law. Accordingly, we hold that the McCarran-Ferguson Act does not preclude HUD's interpretation of the Fair Housing Act."); *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995) (following *American Family* and holding that federal regulation that provides additional remedies to those provided under state insurance plan does not violate MFA).

> preventing "unfair discrimination" between individuals with similar life expectancies and the paramount national interest in preventing racial discrimination in the contexts articulated by §§ 1981 and 1982. *The two nondiscrimination principles complement each other, and Liberty National has not demonstrated that the federal statutes at issue impinge on any declared state policy in the insurance context.* Therefore, the McCarran-Ferguson Act does not require the reverse-preemption of plaintiffs' §§ 1981 and 1982 claims.

Id. at 1222-23 (emphasis added).

Similarly, in *NAACP* v. *American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), the Seventh Circuit found an FHA challenge to an allegedly racially discriminatory practice of "red-lining" was not barred by MFA preemption. The Seventh Circuit noted that:

> If Wisconsin wants to authorize redlining, it need only say so.... American Family has not drawn to our attention, however, any law, regulation, or decision in Wisconsin requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law.... No official of Wisconsin has appeared in this litigation to say that a federal remedy under the Fair Housing Act would frustrate any state policy. Although the McCarran-Ferguson Act gives states the final word on the regulation of insurance unless Congress specifically overrides their choices, Wisconsin's word is consistent with the Fair Housing Act.

Id. at 297.

Additionally, the same issues were reached and accord was found in every **[297]** circuit which has reviewed a MFA preemption challenge to the application of § 1981, § 1982, or the FHA in an insurance context.

B. *Humana* Standard Applied to the Controversy at Bar

Here, all parties agree that the sections of the civil rights statutes under which Appellees seek relief do not "specifically relate to the business of insurance." Therefore, the first *Humana* threshold requirement is met. The resolution of the preemption question then turns on whether the second two prongs can be met: whether there exists a state law or official policy which is directed at the regulation of insurance, and whether application of § 1981, § 1982, and the FHA to the insurance practices at issue here would "impair" that state insurance law. Here, however, Appellants' ability to invoke the MFA preemption fails on both fronts. First, and most importantly, Appellants do not point to any law with which the federal civil rights laws conflict, nor do they direct this Court to any declared regulatory policy which the application of these statutes would frustrate. Moreover, because Appellants do not identify a state law or policy that would be impaired by the application of the federal statutes, it is impossible for them to prevail on the third *Humana* prong, i.e., a finding of impairment caused by the application of the federal law.

The above analysis notwithstanding, Appellants generally contend that the application of federal law to the practices at issues here would impair the state law of Florida and Texas. Under *Humana*, to impair state law, the federal law must either directly conflict with state regulation, frustrate a declared policy, or interfere with an administrative regime.[5] **[298]** Appellants argue that the application of the

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[5] Appellants also urge us to entertain two additional theories of preemption. The first argument, dubbed the "filed rate" argument, is presented to us for the first time in this interlocutory appeal. As an initial matter, we observe that we consider issues raised for the first time on appeal "*only* 'in extraordinary instances . . . to avoid a miscarriage of justice.' " *Martinez* v. *Tex. Dep't of Criminal Justice*, 300 F.3d 567, 573 (5th Cir. 2002) (emphasis in original) (quoting *Doleac* v. *Michalson*, 264 F.3d 470, 492 (5th Cir. 2001)). Moreover, although we have discretion to review on interlocutory appeal those issues which are "fairly included" in the appeal, we do not deem this argument to be fairly included, as it is, at best, ancillary to Appellants' primary arguments in support of preemption. *See*

Reserve Mooring Inc. v. *Am. Commercial Barge Line LLC*, 251 F.3d 1069 (5th Cir. 2001).

Regardless, however, we find Appellants' "filed rate" argument unpersuasive. The application of anti-discrimination laws cannot reasonably be construed to supplant the specific rate controls of Florida and Texas. The application of the civil rights laws cannot even supplant whatever anti-discrimination components may be inherent or express in the insurance rate controls which Florida and Texas may choose to adopt. If Florida or Texas had adopted a specific rate control law or policy that conflicted with the anti-discrimination policies manifested in the civil rights statutes, those states needed only to direct us to that specific law and we would have obligingly considered the purported conflict. Here, however, Appellants do not direct this Court to a direct conflict or to a frustrated and *declared* policy with respect to their filed rate argument. Florida and Texas have recently passed laws regulating credit scoring. *See* Act of June 26, 2003, 2003 Fla. Laws ch. 407, § 3 (to be codified at Fla. Stat. ch. 626.9741); Act of June 11, 2003, ch. 206, § 301, 2003 Tex. Sess. Law Serv. 907, 916 (Vernon) (to be codified at Tex. Ins. Code § 21.49-2U); Act of Feb. 25, 2003, ch. 1, § 3, 2003 Tex. Sess. Law Serv. 1, 2 (Vernon) (to be codified at Tex. Ins. Code § 5.141). However, these laws are not retroactive and thus have no bearing on Appellees' cause of action. Consequently, even were we inclined to address this argument for the first time on appeal, we would find it unavailing.

Appellants' "super actuary" argument is similarly flawed. Appellants argue that "if this case were allowed to proceed and the plaintiffs were able to show disparate impact, the district court will be required to . . . substitute its judgment for the judgment of each of the 50 state insurance departments regarding whether the use of credit scoring is appropriate." This construction, although colorful, is incorrect. Appellants' ominous description of the court's role as "super actuary" sitting in judgment on the specific insurance-rate policy preferences of Florida and Texas is fanciful. In engaging in the unremarkable task of determining whether specific conduct falls within the ambit of federal civil rights law, a court would no more become a "super actuary" than the court becomes a "super entrepreneur" each time the court must determine whether a discriminatory practice constitutes a business necessity. Appellants' attempt to distinguish the business of insurance from other businesses is unpersuasive. The business of insurance is distinguishable only in that Congress has protected the business of insurance from inadvertent federal preemption. Thus, our analysis is concerned only with whether the civil rights laws are in harmony with state regulation. We are not dissuaded from our preemption conclusion merely because a court may eventually be required to determine whether the complained-of conduct actually violates federal law.

civil rights statutes at issue here would frustrate Texas and Florida state insurance policy by frustrating the ability of those states to regulate insurance pricing policies. However, in this argument Appellants adopt entirely a "field preemption" posture, declining to direct the Court to a particular law or declared regulatory policy, and instead confining their argument to the observation that states regulate insurance pricing and then vaguely conjecturing that, somehow, "federal civil rights laws will interfere with and frustrate the abilities of states to regulate insurance rate making."[6]

Thus, if Appellants were to bring a proper motion to dismiss the disparate impact claims under this new theory, and the district court were to decline to dismiss the claims, it would be because the federal regulatory goal of disallowing racially discriminatory insurance pricing is in harmony with the state's goal of disallowing racially discriminatory insurance pricing. While Appellants persist in trying to mold the issues of this appeal into federalism questions, *Humana* makes clear that the field of insurance regulation is not reserved to the states exclusively, that federal law governs concurrently in the area, and that federal law will only be preempted where there is a statutory or policy *conflict*. Therefore, allowing the states to exercise exclusive or autonomous discretion in insurance regulation is not a valid rationale for finding MFA preemption.

[6] In support of this general impairment argument, Appellants rely heavily on *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), a case which is entirely inapposite. In *Doe*, there was an actual *state insurance law* which purportedly conflicted with the application of the ADA to the particular insurance question at issue. There, Illinois enacted a law which permitted caps on health care insurance for patients with AIDS. The state insurance law was challenged under the ADA, and the defendants raised a MFA defense. The Seventh Circuit was required to consider whether the state law conflicted with the ADA, because, if it did, then it would be necessary for the court to determine whether application of the ADA to the AIDS-cap question violated the MFA anti-preemption provision. The Seventh Circuit concluded that the state law did not violate the ADA, so no preemption was found.

Here, however, we have no state law which purportedly conflicts with the application of the civil rights statutes to the particular question of credit-scoring. Therefore, obviously, we cannot consider whether the nonexistent law violates the civil rights statutes such that the application of the civil rights statutes could potentially violate the MFA. The problem here, as elsewhere in Appellants' analysis, is that there simply is no state law for us to consider.

Obviously this assertion is not nearly enough to withstand *Humana* scrutiny. Appellants cannot demonstrate that the federal law in question frustrates a policy associated with the regulation of insurance pricing without identifying an actual policy. Even filling in for Appellants the fact that Florida and Texas might adopt an **[299]** approach different from the approach embodied in the federal statutes, the mere fact that the two approaches are different is not sufficient to create a conflict. The approach of the federal statute must tread upon a declared policy goal of the state scheme. Here, as the district court correctly noted, "Defendants have not drawn the court's attention to any law, regulation, or decision in Texas or Florida requiring . . . [or] condoning" the credit-scoring practice at issue here.[7]

Instead, in adopting this view, Appellants and their supporting *amici* have implicitly adopted the position that the *Humana* Court's use of the phrase "or interfere with a State's administrative regime" means that if the state has a mechanism in place for performing an insurance-related function and the federal law enters that regulatory arena, then the federal law is "interfering" with the state's administrative regime. This interpretation, however, is manifestly at odds with both the facts and express holdings of *Humana*. In *Humana*, the Court expressly rejected a "field preemption" approach to MFA preemption, holding instead that federal and state law can concurrently affect the same issues and further the same goals as long as the federal law does not *frustrate* the state's *declared* policy. "Interference," then, is not synonymous with "a presence in the regulatory field." For example, in *Humana*, the Court found that although states have administrative regimes and mechanisms

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[7] Appellants argue that disparate impact claims are particularly likely to impair state law. We do not agree, and in any case the conflicts Appellants warn of are entirely conjectural. The dissent reiterates Appellants' argument but offers no more convincing evidence that disparate impact suits will necessarily impair state insurance regulation. We therefore decline to differentiate claims of disparate impact and claims of intentional discrimination at this preliminary stage of litigation.

in place to regulate insurance fraud, the question is not whether the state administrative regime has "occupied that field." Instead, the question is whether the regulatory goals are in harmony. RICO, the Court found, supplemented the state's mechanisms for eliminating insurance fraud, and consequently the purpose and goals of both RICO and the state insurance law were in alignment rather than conflict. This line of reasoning clearly demonstrates that the Court has rejected an interpretation of "interference" which is premised on the mere presence of federal law within a facet of insurance regulation for which the state already has an administrative regime in place.

Appellants, however, do not point to an insurance pricing regulatory goal which is hampered by the application of the civil rights laws to the credit-scoring practice at issue here, save the implied goal of allowing the states to pursue their pricing regulatory goals in isolation, which the *Humana* Court clearly rejected as a relevant state policy goal. We conclude, therefore, that the MFA does not preclude Appellees' claims.[8]

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[8] Appellants raise two additional arguments. First, Appellants contend that the enforcement of "private actions for damages" which are available under the civil rights statutes but not under the state scheme would serve to impair the state regulatory scheme. However, it is well-settled that the existence of additional remedies does not create a conflict with state law such that MFA preemption may be found. This argument has been expressly rejected by the Supreme Court in *Humana*, by the Fourth Circuit in *Mackey*, 724 F.2d at 421, by the Seventh Circuit in *American Family*, 978 F.2d at 296, by the Sixth Circuit in *Nationwide Mutual*, 52 F.3d at 1363, and by the Ninth Circuit in *Merchants Home Delivery*, 50 F.3d at 1491-92. We likewise reject it here.

In a similar vein, Appellants argue that the fact that the Florida and Texas departments of insurance regulation are investigating the practices at issue here demonstrates that the application of the federal laws in question would impair state law. Here, Appellants' argument is simply that Florida and Texas both have dedicated mechanisms for regulating discriminatory insurance rates, and that these departments regulate insurance prices with a particular expertise. However, the fact that the state also has a mechanism in place for performing a function which the federal law would affect does not create a conflict. Appellants must show that a conflict exists with a particular law, or that an inconsistency exists with

[300] III.

For the foregoing reasons the ruling of the district court with respect to the question of McCarran-Ferguson preemption is herein AFFIRMED.

EDITH H. JONES, Circuit Judge, concurring in part and dissenting in part:

With due respect to my colleagues, I cannot agree that this nationwide class action challenging insurers' use of credit scoring in the pricing of automobile and home owners' policies can proceed intact under the McCarran-Ferguson Act. The allegations of intentional race discrimination under 42 U.S.C. §§ 1981 and 1982 do not appear to be preempted,[1] but they are a diversion. Plaintiffs' principal attack is under the Fair Housing Act against the alleged disparate impact of a facially-neutral component of insurance pricing decisions.

The majority, in my view, fails to recognize that a disparate impact claim goes to the heart of the risk adjustment that underlies the insurance business. The Seventh Circuit cogently observed: "Risk discrimination is not race discrimination." *NAACP* v. *Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992). Every insurer sets its prices according to the risk embodied in covering particular categories of customers. Thus, young male drivers pay higher premiums than young females or mature drivers because of the higher incidents of policy claims made by that group. To be sure, insurers inflict a disparate impact upon young male drivers, but hardly anyone argues that the impact is unjustified. The relevant inquiries are whether the price differential reasonably conforms to the risk differential and whether,

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state regulatory policy. Here, Appellants only argue that the states already have a scheme in place, and that is not enough to create an MFA preemption.

[1] In this court, §§ 1981 and 1982 have been confined to cases involving intentional racial discrimination, not disparate impact claims. *Arguello* v. *Conoco, Inc.*, 207 F.3d 803, 809 n. 9 (5th Cir. 2000); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986).

in a regulated rate system, the insurer has received an appropriate return.

State insurance commissions, like those of Florida and Texas, are set up to regulate rates by overseeing the insurance companies' assessment of risks and differential pricing decisions. Integral to the regulatory regime is a prohibition on "unfair discrimination" in pricing. Tex. Ins. Code Ann. art. 21.21-6 (Vernon 1981 & Supp.2003); Fla. Stat. ch. 627.031(2) (2002). No matter the exact statutory regime under which the commissions go about their business, they are called upon to balance, verify and make a quasi-legislative determination concerning the adequacy and appropriateness of rates. *Colo. Interstate Gas Co.* v. *Fed. Power Comm'n*, 324 U.S. 581, 589, 65 S. Ct. 829, 89 L. Ed. 1206 (1945) ("Ratemaking is essentially a legislative function."). Their responsibility is ultimately fulfilled by evaluating the companies' comparative risk determinations. Since risk determinations are mathematically complex and multi-faceted, unraveling a single thread, like credit scoring, that is a component of a risk **[301]** formula necessarily affects the entire fabric.

Viewed against this backdrop, it is plain that the instant class action inevitably draws federal courts into the mechanics of insurance pricing and, by the same token, must diminish the scope of action available to state insurance commissioners. The plaintiffs really make no pretense to the contrary, as they allege that the premiums charged to them using credit scoring are discriminatory, excessive, unfair, unconscionable, and unlawful. These terms are nearly identical to those in the statutes that guide the Texas and Florida insurance commissions. The plaintiffs, however, are asking the federal courts to examine one thread from the regulatory fabric, while state insurance commissioners remain responsible for the whole. There is thus a significant difference between intentional discrimination claims and disparate impact claims for purposes of McCarran-Ferguson.

The McCarran-Ferguson Act was designed precisely to prevent this type of federal interference with the states' prerogative of insurance regulation. The majority have not

only misunderstood the intimate connection between the plaintiffs' claims and insurance rate-making, but they have also interpreted the scope of McCarran-Ferguson preemption too narrowly, and they have misapplied lower court precedents. These errors require brief elaboration.[2] In *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999), the Supreme Court's analysis of McCarran-Ferguson preemption parallels its venerable tests for determining the supremacy of federal law over the states. Thus, the Court stated that:

> While we reject any sort of field preemption, we also reject the polar opposite of that view, *i.e.* that Congress intended a green light for federal regulation whenever the federal law does not collide head-on with state regulation. [The Court quotes a dictionary definition of "impair" in § 2(b).] The following formulation seems to us to capture that meaning and to construe, most sensibly, the text of § 2(b): when federal law does not directly conflict with state regulation, *and* when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Humana, 525 U.S. at 309-10, 119 S. Ct. 710 (emphasis added). *Humana* does not require a direct conflict with state law in order to compel preemption. It is enough that the federal law may "interfere with a State's administrative regime." The majority seems to ignore this clear alternative, however, by repeatedly, and incorrectly, demanding evidence of "an enacted law" or a "declared policy."[3]

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[2] Because the majority have correctly quoted § 2(b) of the Act and explained its general parameters, I will not repeat those matters here.

[3] *See, e.g.*, Maj. Opn. at 294 (stating that McCarran-Ferguson preemption "analysis will turn on one of two axises: (1) the existence of an express conflict with the letter of the state law, or (2) the frustration of an officially articulated state regulatory goal"); Maj. Opn. at 295 (noting that in *Humana* "the federal law did not frustrate a *particular* and *declared*

[302] While I would agree that it is too broad to argue that virtually "any federal claim will 'interfere' with the state regulatory regime," a contrast between the facts in *Humana* and the case at bar illustrates why the insurers here are not raising a field preemption defense. In *Humana*, the Court held that RICO law was not preempted by the McCarran-Ferguson Act. In that case, RICO claims were made against an alleged kick-back scheme between a health insurer and various hospitals in such a way that both the cause of action and its remedy ran parallel to those available under Nevada law. The RICO claim did not require a federal fact-finder to investigate the genesis of the insurer's rates, but only whether kick-backs had been illegally made. Further, Nevada authorized the policing of this kind of activity through private citizen lawsuits in its state court.

In this case, by contrast, any *post hoc* declaration that credit scoring is impermissible will require a federal court to determine, in order to assess damages, what a fair and "non-discriminatory" rate for the plaintiffs' policies would have been. A more complete overlap with the state insurance commissions' pricing decisions is impossible to conceive. Because of the sensitivity and complexity of the question of unfair policy price discrimination, both Texas and Florida have

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state regulatory policy" and also stating that the Supreme Court "identified the following three [McCarran-Ferguson] preemption threshold requirements: (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede that state law"); Maj. Opn. at 297 ("Moreover, because Appellants do not identify a state law or policy that would be impaired by the application of the federal statutes, it is impossible for them to prevail on the third *Humana* prong, *i.e.*, a finding of impairment caused by the application of the federal law"); Maj. Opn. at 298 (noting that Appellants failed "to direct the Court to a particular law or declared regulatory policy" or identify "an actual policy"); Maj. Opn. at 299 (stating that "[t]he approach of a federal statute must tread upon a declared policy goal of the state scheme") and (that the appellants have not identified "any law, regulation, or decision in Texas or Florida requiring . . . [or] condoning the credit-scoring practice at issue here").

chosen not to permit plaintiffs to file individual lawsuits in state courts to challenge such decisions. *Key Western Life Ins. Co.* v. *State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 849-50 (1961); *Int'l Patrol & Detective Agency, Inc.* v. *Aetna Cas. & Sur. Co.*, 396 So. 2d 774, 776 (Fla. Ct. App. 1981), *approved by* 419 So. 2d 323, 324 (Fla. 1982). Instead, both states have enacted administrative corrective regimes. The plaintiffs' disparate impact suit will thus interfere with the initial rate-making as well as the corrective procedures utilized by the states.

My colleagues take refuge in a string of appellate court decisions that they believe have approved FHA disparate impact cases against insurance companies. Unfortunately, they are wrong. Two of their principal cases pre-date the *Humana* decision and require direct conflict preemption, a plainly narrower test than that adopted in *Humana*.[4] *See Am. Family Mut. Ins. Co.* 978 F.2d at 295-96; *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140, 116 S. Ct. 973, 133 L. Ed. 2d 893 (1996). Additionally, both of those cases involved only intentional discrimination claims, not, as here, claims of disparate impact.

The single post-*Humana* appellate case in this area is *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), *cert. denied*, 535 U.S. 1018, 122 S. Ct. 1608, 152 L. Ed. 2d 622 (2002). *Moore*, however, involved claims under §§ 1981 and 1982 of intentional racial discrimination in setting **[303]** premiums for life insurance. This case concerns auto and homeowners' insurance, not life insurance. Moreover, what I take issue with here is the claim founded upon the allegedly disparate impact of credit history, a facially neutral risk classification factor, utilized within a complex state regulatory scheme.

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[4] Likewise, two other cases upon which the majority rely also pre-date *Humana* and require a direct conflict with a state law. *See Merchs. Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995); *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984).

The circumstances under which the McCarran-Ferguson Act was enacted by Congress further underscore the majority's error in holding that disparate impact claims under the Fair Housing Act are not preempted. In 1944, the Supreme Court held that insurance companies could be liable for antitrust violations under the Sherman Act for activities related to the setting of premiums. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). "In reaction to *South-Eastern Underwriters*, Congress 'moved quickly,' enacting the McCarran-Ferguson Act 'to restore the supremacy of the States in the realm of insurance regulation.' " *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 40, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (quoting *Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993)). In particular, one of Congress's primary concerns in enacting the McCarran-Ferguson Act was to exempt insurance *ratemaking activities* from the antitrust laws. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 221, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979). In other words, at the very core of the McCarran-Ferguson Act is the insulation of state regulation regarding the fixing of insurance rates from federal laws not specifically directed towards regulating insurance.

Whether credit scoring is useful or advisable as a device for insurance pricing, I cannot say. Florida and Texas have both recently passed laws allowing credit scoring on policies written after January 1, 2004, with numerous limitations. *See* Act approved June 11, 2003, 78th Leg., R.S., S.B. 14, §§ 3.01-3.04 (to be codified at Tex. Ins. Code Ann. art. 21.49-2U) (regulating use of credit scoring for purposes of rate setting and underwriting in, *inter alia*, residential property insurance and personal automobile insurance); 2003 Fla. Laws ch. 407 (to be codified at Fla. Stat. ch. 626.9741) (same); *see also* Act of Feb. 25, 2003, 78th Leg., R.S., ch. 1, § 3(c), 2003 Tex. Gen. Laws 1, 2 (requiring residential property insurers to provide reports to the Texas Insurance Commissioner regarding the use of credit scoring in underwriting and setting premiums). Other states' regulatory policies with re-

gard to credit scoring differ, according to the parties' briefs. But it seems clear to me that federal courts are not competent to tread in the essential domain reserved to state regulators. In today's case, credit scoring is alleged to have a disparate impact. Tomorrow, some other facially neutral criterion, such as the age of one's car or the number of one's dependents, or the city of one's residence, may fall under legal attack. Disparate impact claims under the Fair Housing Act are, in my view, squarely preempted by the McCarran-Ferguson Act and by *Humana*. On this aspect of the majority opinion, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE C. DEHOYOS, EVA PEREZ-DEHOYOS, GEORGIA HARRISON, CHARLES WHITE, SHERYL H. FRANKS, AND MARTEL SHAW, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

ALLSTATE CORPORATION, ALLSTATE INSURANCE COMPANY, ALLSTATE TEXAS LLOYD'S, AND ALLSTATE INDEMNITY COMPANY, DEFENDANTS.

No. Civ.A.SA01CA1010FB

April 5, 2002

[2002 WL 1491650]

ORDER DENYING MOTION TO DISMISS

BIERY, District J.

[1] Plaintiffs in this case essentially allege that Caucasians are in good hands with Allstate, but for non-Caucasians it is hands-off. The Court deduces defendants deny dastardly discriminatory dealings.

Before the Court are Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 8), Plaintiffs' Memorandum in Opposition to Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 20) and Defendants' Reply in Support of Motion to Dismiss (marked "Received" by the District Clerk on March 18, 2002). Also pending are Plaintiffs' Motion for Additional Pages for Plaintiffs' Response to Defendants' Motion to Dismiss (docket no. 19) and defendants' Unopposed Motion for Extension of Page Limit (docket no.

21). After careful consideration, the Court is of the opinion the motion to dismiss (docket no. 19) should be denied. The Court is also of the opinion that plaintiffs' motion for additional pages should be dismissed as moot as plaintiff's memorandum in opposition to defendants' motion to dismiss (docket no. 20) has been filed as part of the record in these proceedings. The Court is further of the opinion that defendant's unopposed motion for extension of the page limit (docket no. 21) should be granted such that Defendants' Reply in Support of Motion to Dismiss (marked "Received" by the District Clerk on March 18, 2002) should be filed as part of the record in these proceedings.

BACKGROUND

Six proposed class members from Texas and Florida bring this action against the defendant property and casualty insurers to challenge credit scoring as a form of unfair racial discrimination pursuant to which defendants charge non- Caucasians higher rates. According to plaintiffs' complaint, defendants obtain information from credit reports on each applicant and improperly factor this information into a secretive[1] credit scoring formula. Plaintiffs allege defendants use this credit-scoring system to place non-Caucasian applicants in more expensive types of policies and to target non-Caucasians for the sale of more expensive policies than the policies sold to similarly situated Caucasians. The complaint states that plaintiffs have been wrongfully discriminated against on the basis of race in violation of 42 U.S.C. § 1981 (the right to be free of racial discrimination in making contracts); 42 U.S.C. § 1982 (the right to be free of racial discrimination in buying real property); and 42 U.S.C. § 3604 (the Fair Housing Act).

Defendants contend plaintiffs' claims that they were charged unfairly discriminatory premiums should be dismissed because: (1) plaintiffs' claims are barred by the McCarran-Ferguson Act; (2) this Court should abstain from

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[1] Plaintiffs' assertion that "[d]efendants have consistently refused to disclose their credit algorithms" is undisputed.

deciding these issues under the *Burford* abstention doctrine; and (3) the complaint fails to allege facts which, if proven, would establish that defendants engaged in intentional discrimination. Plaintiffs maintain that the McCarran-Ferguson Act does not preempt their claims. They further contend that the *Burford* abstention doctrine does not prevent this Court from retaining jurisdiction and addressing plaintiffs' claims. Plaintiffs also argue that they have sufficiently alleged discriminatory intent.

STANDARD OF REVIEW

[2] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint which fails to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A dismissal under rule 12(b)(6) is not a preferred avenue of adjudication and is looked upon with disfavor. *See Kaiser Aluminum & Chem. Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In considering a rule 12(b)(6) motion, two general rules must be followed. *Id.* First, all well-pleaded facts in the complaint must be accepted as true, and a complaint should be liberally construed in favor of a plaintiff. *Id.* Second, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitled him to relief." *Id.* The Fifth Circuit has recognized two exceptions to the general rules. Where a complaint asserts merely conclusory allegations, a court should not accept as true these conclusory statements. *Id.* Also, where a complaint shows on its face it is barred by an affirmative defense, a court may dismiss the action for failing to state a claim. *Id.*

In determining whether a complaint states a claim upon which relief may be granted, a court must not look beyond the pleadings. *See Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 499-500 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). "[U]nless the pleadings on their face reveal beyond doubt that the plaintiffs can prove no set of facts that would entitle them to relief," a

12(b)(6) dismissal is improper. *Garrett* v. *Commonwealth Mortgage Corp.*, 938 F.2d 591, 594 (5th Cir. 1991).

DISCUSSION

The McCarran-Ferguson Act

The McCarran-Ferguson Act precludes the application of a federal statute in the face of state measures "enacted . . . for the purpose of regulating the business of insurance," if the federal law does not "specifically relate[ ] to the business of insurance," and would "invalidate, impair, or supersede" the state's regulations. *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 307 (1999); *see also* 15 U.S.C. § 1012(b). 42 U.S.C. § 1981, 42 U.S.C. § 1982 and the Fair Housing Act are not laws which "specifically relate[ ] to the business of insurance." This case, therefore, turns on whether the application of these federal anti-discrimination laws to plaintiffs' claims would "invalidate, impair, or supersede" Texas and Florida state laws regulating insurance. Defendants argue it would because: (1) both states have comprehensive insurance regulatory schemes and laws prohibiting discrimination in insurance; (2) state discrimination in insurance laws provide no private right of action; (3) state choices about the proper conduct of the business of insurance would be displaced; and (4) Texas and Florida insurance departments are investigating the effect of credit scoring on insurance.[2]

[3] Courts have consistently rejected the McCarran-Ferguson Act defense in race-based discrimination cases despite comprehensive state regulatory schemes and laws prohibiting discrimination in insurance. *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1223 (11th Cir. 2001) (McCarran-Ferguson Act does not prevent plaintiffs from proceeding with 42 U.S.C. § 1981 & 42 U.S.C. § 1982 race-based discrimination claims against insurer despite state statute prohibiting discrimination); *NAACP* v. *American Family Mut.*

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[2] Defendants contend that plaintiffs challenge "rate making" practices, while plaintiffs contend they challenge "underwriting tools." For purposes of defendants' motion to dismiss, the Court makes no differentiation between the two.

Ins. Co., 978 F.2d 287, 293-301 (7th Cir. 1992) (McCarran-Ferguson Act does not preempt plaintiff's 42 U.S.C. § 1981, 42 U.S.C. § 1982 & Fair Housing Act claims arising out of insurance company's racially discriminatory practices despite comprehensive state regulatory mechanisms and anti-discrimination laws in context of insurance), *cert. denied*, 508 U.S. 907 (1993); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (McCarran-Ferguson Act does not preclude application of Fair Housing Act to claims of discrimination in insurance through redlining even though state had procedures to regulate insurance and applicable state law prohibited such discrimination). This is true even though the state statutes prohibiting discrimination in insurance provide no private right of action. *NAACP*, 978 F.2d at 295, 297; *Cisneros*, 52 F.3d at 1363.

In the absence of a state practice authorizing the challenged action, "[n]othing in this conclusion permits federal law to displace states' choices about the proper conduct of the business of insurance." *NAACP*, 978 F.2d at 297. Defendants have not drawn the Court's attention to any law, regulation or decision in Texas or Florida requiring the challenged credit-scoring system, condoning this practice, committing to insurers all decisions about credit-scoring or holding that this credit-scoring system does not violate state law. *See id.* (placing burden upon defendant to show that state has authorized race-based discriminatory insurance practices); *see also Moore*, 267 F.3d at 1222 ("Liberty National has not demonstrated that §§ 1981 and 1982, applied to insurance contracts, frustrate any declared state policy, because they have not demonstrated that it is in fact the policy of Alabama to encourage or condone racial distinctions in the provision of life insurance."). Moreover, although investigations regarding the effect of credit scoring on insurance may be ongoing, no official of Texas or Florida has appeared to argue that a federal remedy under section 1981, section 1982 or the Fair Housing Act would frustrate any state policy. *See NAACP*, 978 F.2d at 297 (noting absence of state official who would state that "Wisconsin's word" is inconsistent with Fair Housing Act); *see also Moore*, 267 F.3d at 1222 (noting

that, as in *NAACP*, state official "had not intervened to argue that the federal law at issue would frustrate its scheme of insurance regulation.").

[4] Additionally, similar cases regarding discrimination in life insurance are pending in the Fifth, Second and Eleventh Circuits. *See In re Industrial Life Ins. Litig.*, MDL Nos. 1371, 1382, 1390, 1391, 1395 (E.D. La); *Moore* v. *Liberty Nat'l Life Ins. Co.*, No. CV-99-BU-3262-S (N.D. Ala.) *Thompson* v. *Metropolitan Life Ins. Co.*, Nos. 00 Civ. 5071(HB), 00 Civ. 9068(HB), 01 Civ.2090(HB) (S.D.N.Y.). Plaintiffs represent, without dispute by defendants, that "a number of state insurance departments conducted their own investigations into the claims raised in these cases." The McCarran-Ferguson defense was raised in *Moore*, although the Eleventh Circuit held that the Act did not apply to bar plaintiffs' 42 U.S.C. § 1981 and 42 U.S.C. § 1982 claims. *See Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1223 (11th Cir. 2001). The McCarran-Ferguson defense, plaintiffs maintain without challenge from the defendants, "was not even raised in the other cases."

Defendants state that "[p]laintiffs completely ignore the paradigm case for deciding this motion," *Doe* v. *Mutual of Omaha.* 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000). In *Mutual of Omaha*, the Seventh Circuit held that an insurance policy with a cap on AIDS coverage did not violate Title III, the public accommodations provision, of the Americans With Disabilities Act ("ADA"). *Id.* at 559-65.[3]

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[3] This comports with the weight of authority from other circuit courts, including the Fifth Circuit. *McNeil* v. *Time Ins. Co.*, 205 F.3d 179, 187-88 (5th Cir. 2000) (Title III of the ADA does not apply to coverage terms of health insurance policy), cert. denied, 531 U.S. 1194 (2001); *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000) (disability plan which provided greater benefits for physical disabilities than for mental ones did not violate ADA); *Lenox* v. *Healthwise, Ltd.*, 149 F.3d 453, 453 (6th Cir. 1998) (ADA does not prohibit health insurance providers from differentiating between persons with different disabilities); *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998) (insurance policy limiting coverage for mental disabilities does not violate Title III), *cert. denied*, 525 U.S. 1093 (1999); *Parker* v. *Metropolitan Life Ins. Co.*,

"The common sense of the statute," the Court explained, "is that the content of the goods or services offered by a place of public accommodation is not regulated." *Id.* at 560. In this case, plaintiffs challenge access to insurance as opposed to the contents of the policy. *See id.* (There is a difference between refusing to sell a health-insurance policy at all to a person with AIDS, or charging him a higher price for such a policy, ... and ... offering insurance policies that contain caps for various diseases some of which may also be disabilities."). Defendants' motion to dismiss based on the McCarran-Ferguson Act is denied.

The Buford Doctrine

Defendants contend this Court should dismiss plaintiffs' claims under the *Buford* abstention doctrine. *Buford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). The Fifth Circuit has determined:

> Essentially, *Buford* instructs a district court to weigh the federal interests in retaining jurisdiction over the dispute against the state's interests in independent action to uniformly address a matter of state concern, and to abstain when the balance tips in favor of the latter.

Webb v. *B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 700 (5th Cir.) (citations omitted), *cert. denied*, 528 U.S. 964 (1999). "But, this balance only rarely favors abstention." *Id.* (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 728 (1996)).

Defendants reurge their argument that this type of insurance issue is one regulated by the states. However, as defendants point out, relevant state statutes do not provide for a private cause of action under which plaintiffs could raise their claims. Only the federal anti-discrimination laws can provide plaintiffs with the relief they seek. Ordinarily, federal courts "have a virtually unflagging obligation ... to

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121 F.3d 1006, 1012 (6th Cir. 1997) (Title III does not regulate content of goods & services), *cert. denied*, 522 U.S. 1084 (1998).

exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). Additionally, there is a federal interest in this case as plaintiff's causes of action sound solely in federal law. *See id.* Finally, the Court does not find that adjudication of this matter would disrupt state efforts to establish coherent state insurance policies. *See McNeese* v. *Board of Educ.*, 373 U.S. 668, 674 (1963). This is not a case which involves federal claims which are "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.; see also See NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) ("State and federal rules that are substantially identical but differ in penalty do not conflict with or displace each other."), *cert. denied*, 508 U.S. 907 (1993). Defendants' motion to dismiss based on the *Burford* abstention doctrine is denied.

Intentional Discrimination

[5] Defendants allege plaintiffs have not sufficiently alleged discriminatory intent. After careful consideration of defendants' arguments, plaintiffs' response and complaint, the Court is of the opinion that plaintiffs have sufficiently alleged discriminatory intent for rule 12(b)(6) purposes at this early juncture in these proceedings. To this extent, defendants' motion to dismiss is denied.

OPTIONS TO APPEAL

The Court is of the opinion this Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of this litigation. *See* 28 U.S.C. § 1292(b) (governing interlocutory appeals). If defendants choose to do so, the Court will look favorably upon a properly and timely filed motion for leave to file an interlocutory appeal. *See* Fed. R. App. P. 5 (governing requests for permission to appeal by permission); *see also* Fed. R. App. P. 8 (governing requests for stay pending appeal).

IT IS THEREFORE ORDERED that Before the Court are Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 8) is DENIED;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Additional Pages for Plaintiffs' Response to Defendants' Motion to Dismiss (docket no. 19) is DISMISSED as MOOT as plaintiff's memorandum in opposition to defendants' motion to dismiss (docket no. 20) has been filed as part of the record in these proceedings;

IT IS FINALLY ORDERED that defendants' Unopposed Motion for Extension of Page Limit (docket no. 21) is GRANTED such that the District Clerk is directed to file Defendants' Reply in Support of Motion to Dismiss (attached to the motion for leave and marked "Received" by the District Clerk on March 18, 2002).

It is so ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50721

JOSE C. DEHOYOS; EVA PEREZ-DEHOYOS; GEORGIA HARRISON; CHARLES WHITE; SHERYL H. FRANKS; MARTEL SHAW, PLAINTIFFS-APPELLEES,

v.

ALLSTATE CORPORATION; ALLSTATE INSURANCE COMPANY; ALLSTATE TEXAS LLOYD'S; ALLSTATE INDEMNITY COMPANY, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

[STAMP: U.S. Court of Appeals
FILED NOV 25, 2003
Charles R. Fulbridge III, Clerk]

ON PETITION FOR REHEARING EN BANC

(Opinion 9/3/03, 5th Cir., ____, ___ F.3d ____)

Before DAVIS, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Judge Jones would grant panel rehearing for the reasons set out in her dissent to the panel opinion.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

* Judge Wiener did not participate in the consideration of the rehearing en banc.

(3)

No. 03-1214

Supreme Court, U.S.
FILED
MAR 2 4 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE DEHOYOS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the Fifth Circuit correctly held that respondents' federal civil rights claim for disparate racial impact (42 U.S.C. § 3604) is not preempted by the McCarran-Ferguson Act (15 U.S.C. § 1012(b)), because the federal claim complements and does not frustrate, conflict or interfere with state insurance laws, policies or regulatory regimes when:

(i) no state regulator objected to respondents' suit, Allstate never disclosed its credit formula to Florida or Texas insurance regulators, and neither state regulated credit scoring as part of its oversight of insurance ratemaking, but at most had initiated investigations to determine whether to regulate such credit practices, and

(ii) both Florida and Texas law prohibit insurance sales practices that are racially discriminatory, and permit private suits for race discrimination in insurance, including disparate impact suits under local fair housing acts that are modeled on §3604, and the complaint alleges that Allstate's credit formula is ***not*** race-neutral.

PARTIES

Respondents Jose C. DeHoyos, Eva Perez-DeHoyos, Georgia Harrison, Charles White, Sheryl H. Franks, and Martel Shaw, who were plaintiffs and appellees below, are non-Caucasian policyholders of petitioner Allstate's automobile and homeowners insurance policies. Respondents sued Allstate Corporation, et al., for intentional and disparate impact racial discrimination in the sale of insurance.

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IN THE

Supreme Court of the United States

No. 03-1214

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE DEHOYOS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondents filed a federal civil rights suit against petitioners alleging that Allstate used race-based credit scoring to place non-Caucasians in higher premium auto and homeowners insurance policies. Respondents advanced claims for intentional discrimination under 42 U.S.C. §§ 1981, 1982 and 3604, and an alternative claim of disparate impact discrimination under § 3604.

Allstate moved to dismiss on the ground that all of respondents' claims were preempted by the McCarran-Ferguson Act (15 U.S.C. § 1012(b)) (the "Act"), assertedly because the claims would interfere with insurance ratemaking regulation by the states of Florida and Texas. Allstate's motion was denied by the district court. The Fifth Circuit

affirmed unanimously on the intentional claims, with one judge dissenting on the disparate impact claim. The lower courts reasoned that under this Court's decision in *Humana Inc. v. Forsyth*, 525 U.S. 299, 309-12 (1999), preemption was not justified just because the states regulated the "field" of insurance ratemaking. The Fifth Circuit concluded that, at the pleading stage, Allstate had not identified in the record any state law, policy, regulation or regime that required or condoned the use of credit scoring to place non-Caucasians in higher premium policies than Caucasians. (App. 10a-12a)

In its petition, Allstate abandons its efforts to preempt respondents' intentional discrimination claims under §§ 1981, 1982 and 3604, and seeks certiorari only on respondents' alternative disparate racial impact claim under § 3604. Certiorari is unwarranted in this case for the following reasons:

First, the question presented is not an issue of exceptional importance. Employing overheated rhetoric, Allstate repeatedly asserts that allowing respondents to pursue their disparate impact claim will cause a "momentous," "enormous," "dramatic," "revolution[ary]" disruption of state insurance regulation. (Pet. 13, 15-17, 21) Allstate (and its insurance industry *amici*) raised the same parade of horribles in the lower courts to respondents' intentional discrimination claims, but abandons those objections here. If Allstate's "fears" had any basis, one would have expected state regulators to intervene and object—but none did in the district court or the Fifth Circuit. In *Humana*, this Court found it significant that the state "filed no brief at any stage of this lawsuit urging that application of [federal law] to the alleged conduct would frustrate any state policy, or interfere with the state's administrative regime." *Humana*, 525 U.S. at 313. The . Act protects state regulators—not insurance companies (especially ones that engage in race discrimination). In previous cases, this Court has treated "sky-is-falling" rhetoric like Allstate's with skepticism: "We

do not believe that disparate impact theory need have any chilling effect on legitimate business practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

By focusing on disparate impact, Allstate hopes to avoid disclosure of its race-based credit formula. But, Allstate cannot avoid judicial scrutiny of the disparate impact of its credit practices even if this suit alleged only intentional discrimination. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact, if it is true, that the . . . [conduct alleged] bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). In an intentional discrimination case, once plaintiffs present a prima facie case, the defendant must show a legitimate business justification for its practices, but plaintiffs then have the opportunity to prove that the justification is a pretext for racially discriminatory conduct. *E.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Thus, both disparate impact and business necessity would remain subject to judicial review.[1]

Second, both Florida and Texas permit private discrimination suits, including suits challenging disparate impact discrimination under state fair housing acts modeled on § 3604. Tex. Prop. Code § 301.151; Fla. Stat. §760.35. The Texas FHA was enacted to "provide rights and remedies substantially equivalent to those granted under federal law." Tex. Prop. Code § 301.002(3). Similarly, Florida state courts have held that the Florida FHA, like §3604, prohibits both

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[1] It is hard to take seriously Allstate's assertion that, unlike state regulators, federal courts in disparate impact suits have "no broad warrant to consider the public interest" and focus only on the particular litigants before the court. (Pet. 18) This Court "has long recognized" that the "public policy" implications of court decisions are present in almost every case. *E.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 403 (1981).

intentional discrimination and incidental (*i.e.*, disparate impact) discrimination. *Dornbach v. Holley*, 854 So. 2d 211, 213 (Fla. App. 2002). Thus, the federal FHA does not interfere with state regulatory regimes and is not preempted because it complements state FHA remedies.

Third, the Fifth Circuit panel correctly applied *Humana*, 525 U.S. at 308-12. Under *Humana*, preemption is not required in this case because no state law, regulation, declared state policy or administrative regime requires, condones or approves Allstate's discriminatory credit formula. To the contrary, both Florida and Texas law prohibit race discrimination in the sale of insurance. Fla. Stat. §§ 624.155(1)(a) & (7), 626.9541(1)(x)1, 626.9631; Tex. Ins. Code art. 21.21 § 8; art. 21.21-6 § 3(a).

Fourth, the panel is not in conflict with the Seventh Circuit, which has twice rejected preemption of §3604 disparate impact claims. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Com'n*, 24 F.3d 1008, 1016 (7th Cir. 1994). Allstate's reliance on *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), is misplaced. There, the Seventh Circuit recognized that, unlike the ***content*** of a policy, an insurer's discriminatory conduct affecting ***access*** to insurance is not preempted: "There is, as we have pointed out, a difference between refusing to sell a health-insurance policy at all to a person with AIDS, or charging him a higher price for such policy . . . on the one hand, and, on the other, offering insurance policies that contain caps for various diseases . . . ." *Id.* at 563. "But thus limited to a simple prohibition of discrimination, section 302(a) does not impair state regulation of insurance . . . ." *Id.* at 564.

Last, but not least, the record does not even present, let alone support, the disparate impact theory advanced in the petition. This interlocutory appeal arises from the denial of

Allstate's motion to dismiss respondents' complaint. Despite the early stage of the proceedings, Allstate's petition describes as fact the insurance industry's pricing and underwriting of homeowners insurance. But the petition is unsubstantiated by record citation, record evidence, or indeed any evidence. (Pet. 2-6)

For example, Allstate frames the issue and repeatedly asserts that its credit scoring practices are "race-neutral" and actuarially "sound." (Pet. i, 9, 16, 28) But respondents' complaint alleges that Allstate's credit formula is "racially discriminatory," and a "pretext" for placing non-Caucasians in high rate policies—and thus anything but race-neutral. (R4-5, 8 ¶¶ 14-17, 27-28)[2] The complaint further alleges that Allstate has "refused to disclose any legitimate actuarial basis" for its credit formula and had "vigorously opposed" state "regulatory efforts" to discover the formula. (R5 ¶ 16, R8 ¶ 28) The district court found these allegations were not disputed by Allstate. (R160 n.1)

At the pleading stage, it is improper for Allstate to inject factual assertions that have no basis in the record. *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974) (holding lower courts "erroneously accepted as a fact" matters not in evidence). Rather, the complaint's factual allegations must be accepted as true and "construed favorably to the pleader." *Id.* at 236; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination*, 507 U.S. 163, 164 (1993). Allstate's asserted new "facts" do not exist at this stage. *Scheuer*, 416 U.S. at 249-50. This Court's decision in *Humana*, 525 U.S. at 304, arose on summary judgment—with a full factual record. Here, no evidence was presented that state regulatory regimes were impaired.

The record is deficient for another reason. Allstate's motion to dismiss made a blanket "field preemption" attack

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[2] "R" = The original record on appeal in the Fifth Circuit.

on all of plaintiffs' discrimination claims, but raised no separate theory for disparate impact claims until its reply below (R35-53, 151-55)—which is too late and waives the issue. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Neither did the district court separately address disparate impact preemption or certify that question for interlocutory appeal. (R159-67, 216) The Fifth Circuit noted the "new" theory, and only addressed the merits briefly. (App. 10a-n.5) Ordinarily this Court does not pass on questions not de cided in the lower courts. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 688 n.30 (1979); *Glover v. United States*, 531 U.S. 198, 205 (2001).

STATEMENT OF THE CASE

1. Respondents are Hispanic-American and African-American policy owners of petitioner Allstate's automobile and homeowners insurance. Respondents filed a complaint seeking relief under the civil rights laws, 42 U.S.C. §§ 1981, 1982 and 3604, alleging that Allstate engaged in a nationwide scheme of racial discrimination. Respondents allege that, beginning in the early 1990s, Allstate used racially slanted credit formulas to place its non-Caucasian policyholders in higher risk rate classifications for auto and homeowners insurance, based on credit rather than risk. (R1 ¶ 1, R4-5 ¶¶ 13-15) Respondents' complaint mainly alleges that Allstate engaged in intentional discrimination, but also includes an alternative claim under §3604 for disparate racial impact. (R4-5 ¶ 14, R18-20 ¶¶ 80, 88, 94)

The complaint details that Allstate's current credit scoring is a continuation of its earlier discriminatory "redlining" policy, an underwriting practice through which Allstate established geographical districts to identify non-Caucasian neighborhoods. Allstate then placed applicants living in such areas in higher premium policies because of their race. (R4 ¶ 15, R13-14 ¶¶ 55, 61) Beginning in the early 1990s, when

redlining fell into disrepute and under judicial scrutiny, Allstate turned to credit scoring to accomplish the same discriminatory purpose. Allstate obtained credit reports on applicants for insurance and used the credit scores as an underwriting criterion ostensibly to assess an applicant's "financial stability." The complaint alleges Allstate uses the credit scores it obtains as a pretext to identify non-Caucasians in order to charge them higher premiums. (R4-5 ¶ 15) Specifically, the credit score, which respondents allege has no reasonable relationship to risk of loss, is used by Allstate to justify the placement of non-Caucasian applicants in high risk, more expensive policies. (R4-6 ¶¶ 15, 16, 20, 21) As a result, non-Caucasians are paying higher discriminatory premiums unrelated to their level of risk. (R6 ¶¶ 20-21)

The complaint further alleges that Allstate has concealed its credit formula, not only from the public, but from its own agents, and most importantly, from state regulators. (R5 ¶ 16, R8 ¶ 28) The district court found this allegation undisputed. (R160 n.1)

2. Allstate moved to dismiss the complaint. The motion advanced a broad "field" preemption attack on all of respondents' civil rights claims. Allstate contended that the Act preempted all such claims because the states' administrative regimes comprehensively regulated insurance rate-making. (R34, 39-42) Allstate made no separate issue of respondents' alternative disparate racial impact claims under § 3604, except for a throw-away sentence in the last paragraph of its motion. That sentence asserted that plaintiffs' claim of disparate impact, even if proven, required inquiry into whether Allstate's credit practices had a legitimate business purpose, which was an issue solely for state insurance regulators. (R52-53) But that point was buried within Allstate's contention (rejected by the district court) that respondents' complaint did not allege sufficient facts to sustain its intentional discrimination claim. *Id.*

Because Allstate did not raise the issue, respondents did not separately address disparate impact in their opposition, except to mention they had such an alternative claim. (R115 n.2)

For the first time in its reply, Allstate presented at length a new contention that respondents' disparate impact claim was preempted because it would interfere with the state's administrative regime regulating insurance ratemaking—including credit scoring. (R151-55) Allstate ignored its own tacit acknowledgment that since 1990 neither Florida nor Texas regulated credit scoring. At most, Allstate said these states had initiated investigations of insurer credit practices in 2002—to determine whether to regulate. (R38-39) Allstate also ignored the complaint's allegation that Allstate has actively concealed its credit practices from state regulators. (R8 ¶ 28)

3. Applying this Court's decision in *Humana*, 525 U.S. 299, and decisions from three other circuits, the district court ruled that respondents' federal civil rights claims under 42 U.S.C. §§ 1981, 1982 and 3604, were not reverse preempted under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)—but certified its order for a 28 U.S.C. § 1292(b) appeal. (R162-65)

The district court reasoned that Allstate did not identify any Texas or Florida law, regulation or decision "requiring" or "condoning" credit scoring or "committing to insurers all decisions about credit-scoring" or stating that credit scoring "does not violate state law." (R163) The court accepted Allstate's concession that Florida and Texas had initiated investigations of credit scoring (R138-39), and found that no official of those states had appeared to argue that the federal civil rights claim "would frustrate any state policy." (R164) The court added that Allstate did not dispute the allegation that it has never disclosed its credit scoring formula to state regulators. (ER 160 n.1) The court distinguished *Doe*, 179 F.3d 557, as a case involving the "content" of a disabled

person's insurance policy, not "access" to insurance as in this case—which the Seventh Circuit held included "charging him a higher price." *Id.* at 560. (ER 165) The district court did not separately address or certify the disparate impact theory raised in Allstate's reply.

4. On interlocutory appeal to the Fifth Circuit, the panel held that none of respondents' claims were preempted. Judge Jones concurred with Judges Benavides and Davis that respondents' intentional race discrimination claims under §§ 1981, 1982 and 3604 were not preempted by the McCarran-Ferguson Act. (App. 2a, 13a) Allstate does not seek certiorari on that ruling. Judge Jones dissented only as to respondents' alternative claim of disparate racial impact under § 3604. (App. 13a-18a) Allstate's petition is limited to that claim.

The panel majority viewed Allstate's contention—that if respondents proved disparate impact, the district court would be required to act as "super actuary" in deciding whether Allstate's credit scoring is justified by "business necessity" —as a "new theory" that had not been preserved. (App. 10a & n.5) The majority nevertheless addressed the issue. The majority pointed out that Allstate's (and Judge Jones') parade of horribles were "entirely conjectural" because no evidence of impaired state regulation was before the court at the motion to dismiss stage. (App. 11a & n.7) The majority reasoned federal courts were well-acquainted with issues of business necessity in discrimination cases, and in any event, federal civil rights laws were "in harmony" with state laws which also prohibit race discrimination in insurance pricing. (App. 9a-12a)

The panel majority also addressed Allstate's contention that respondents' claims would impair state law by interfering with the state's administrative regime. (App. 8a, 10a) The panel held that Allstate had not identified any state law, policy, decision, regulation or regime that requires or con-

dones the use of credit scoring to "place" non-Caucasians in more expensive policies than Caucasians. (App. 11a) The panel reasoned that Allstate did not identify the administrative policy or regime that was impaired, but instead, advanced a "field preemption" theory that all federal civil rights claims would interfere with the states' regulation of insurance ratemaking. (App. 10a-12a) To the panel majority, *Humana* rejects such a "field preemption" interpretation of the Act based on a state having a general scheme of regulation of insurance ratemaking in place. Rather, the panel held that *Humana* requires identification of a specific state insurance regulatory goal that is hampered by application of civil rights law—which Allstate failed to do. (App. 12a)

REASONS FOR DENYING CERTIORARI PETITION

A. The Question Presented by the Petition Is Not of Exceptional Importance, Nor Does the Record Raise the Question Presented, When Allstate Has Never Disclosed Its Race-Based Credit Formula to State Regulators, and No State Objected that Respondents' Suit Interfered with Its Regulatory Regime

Allstate contends that the issue presented is of exceptional importance. Allstate rationalizes that if plaintiffs' disparate impact claim is not preempted, a federal court may be asked to determine whether the use of credit scoring is a "business necessity," which may conflict with a state's hypothetical determination of the same issue in the future. (Pet. 18)

Allstate's theory is hypothetical because it has acknowledged throughout these proceedings that neither Texas nor Florida had laws, regulations or policies regulating credit scoring when this suit was filed. At most, Allstate said the states were "investigating" whether credit scoring was an issue that required regulation. (AOB 13-14) Such pre-

liminary investigation is not regulation, let alone a state regulatory regime covered by the McCarran-Ferguson Act. Moreover, as the district court found, Allstate has never disclosed its credit formula to the state for regulation. (R160 n.1)

More importantly, no state regulator has appeared in this case to protest that the federal suit interferes with state regulatory policy. That lack of protest totally negates Allstate's assertion that respondents' civil rights suit "interferes" with the state's administrative regime. *Humana*, 525 U.S. at 313-14. The McCarran-Ferguson Act protects state insurance regulators, not insurers who evade regulation and also seek to evade judicial scrutiny of racial discrimination.

Further, Allstate's assertion that respondents' disparate impact claim interferes with state insurance ratemaking regulation is purely conjectural at the pleading stage. No facts have been developed to demonstrate any interference. It is improper to inject facts at the pleading stage; Allstate must await trial or summary judgment as in *Humana*, 525 U.S. at 304. *Scheuer*, 416 U.S. at 249-50.

For example, Allstate asserts that state regulators have already "approved or accepted" insurance rate structures and "concluded" they "did not result in unfair discrimination under state insurance law." (Pet. 14) There is no evidence or record reference to substantiate that. To the contrary, the complaint alleges, and the district court found undisputed, that Allstate never disclosed its credit formula to Florida or Texas, that neither state addressed credit practices as part of their regulation of rates (but were only investigating whether to regulate), and both states prohibit and allow suits for race discrimination—including disparate impact in the sale of insurance. (R5 ¶ 16, 8 ¶ 28, 160 n.1)

Similarly, Allstate's assertion that state regulators might allow disparate impact in insurance rates as a "public good" (Pet. 18), has no basis. No record citation appears. *Id.* In fact, as detailed in this opposition, state insurance laws prohibit race discrimination in insurance sales and state fair housing laws prohibit and allow suits for disparate racial impact. This Court has repeatedly emphasized that suits designed to remedy race discrimination are in the public interest: "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public sphere." *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). Federal civil rights laws are viewed by this Court as providing "[a] unique remedy" broadly enforceable in federal courts that is "'supplementary to any remedy any State might have.'" *Owens v. Okure*, 488 U.S. 235, 248 (1989) (citations omitted).

In any event, as previously discussed, federal courts would examine an insurer's business necessity defense and evidence of disparate impact in adjudicating claims of intentional discrimination. *McDonnell Douglas*, 411 U.S. at 802-05; *Washington*, 426 U.S. at 242. Allstate is simply wrong in asserting such issues would escape judicial scrutiny by preemption of respondents' disparate impact claim.

Finally, Allstate did not raise a separate disparate impact theory in its motion to dismiss, but only in its reply. The district court did not address it and the Fifth Circuit addressed it briefly noting the "new" theory. (App. 10a & n.5) As such, Allstate waived the issue. *Yohey*, 985 F.2d at 225 ("This Court will not consider a claim raised for the first time in a reply brief."). This Court ordinarily declines to take up issues not passed upon below. *Glover*, 531 U.S. at 205.

B. Plaintiffs' Disparate Impact Claim Under 42 U.S.C. § 3604 Is Not Preempted When State Laws Also Permit Private Discrimination Suits, Including Disparate Impact Claims Under State Fair Housing Laws Modeled on the Federal Statute

Allstate (and Judge Jones) also overlook the fact that both Texas and Florida permit private racial discrimination suits, including claims for disparate impact under state fair housing acts modeled on the federal FHA.

Florida law provides that "[a]ny person may bring a civil action against an insurer when such person is damaged" by a violation of certain other statutory provisions. Fla. Stat. § 624.155(1)(a). One of those provisions involves race discrimination in the sale of insurance as an unfair trade practice: "the refusal to insure, or continue to insure, any individual or risk solely because of: race, color . . . ." Fla. Stat. § 626.9541(1)(x)1. Consistent with *Humana*, 525 U.S. at 312, Florida insurance law is "not hermetically sealed." Florida law makes clear that even its civil suit remedy under § 624.155, does ***not*** preempt other civil remedies: "The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state." Fla. Stat. § 624.155(7). Neither do Florida administrative remedies bar civil suits: "The provisions of this part are cumulative to rights under the general civil and common law, and no action of the department commission, or office shall abrogate such rights to damages or other relief in any court." Fla. Stat. § 626.9631.

Similarly, Texas insurance law bars race discrimination and does not foreclose private suits. Texas explicitly provides administrative sanctions for race discrimination by defining "unfair discrimination" to mean: "Refusing to insure, refusing to continue to insure; limiting the amount, extent, or kind of coverage available; ***or charging an individual a***

different rate for the same coverage because of race, color, religion, or national origin." Tex. Ins. Code art. 21.21-6 § 3(a) (emphasis added).

Contrary to Allstate's assertions throughout this litigation, article 21.21-6 § 4(a) of the Texas Insurance Code does not authorize an insurer to advance a defense to racial distinctions in insurance rates "based upon sound underwriting or actuarial principles." Art. 21.21-6 § 4(a), which allows for an actuarial defense, cross-references only §§ 3(b) and 3(c), of article 21.21-6, covering age, gender, marital status and disability discrimination—but does not cross-reference § 3(a) of article 21.21-6, which prohibits discrimination "because of race, color, religion, or national origin." Thus, contrary to Allstate's assertion (Pet. 19), under Texas law, there is no actuarial defense to race discrimination claims, whether based on intentional discrimination or disparate impact.

Further, nothing in article 21.21-6 provides that the administrative penalty is an exclusive remedy for race discrimination in the sale of insurance. To the contrary, Texas Insurance Code article 21.21 § 8 provides: "No order of the Board under this Act . . . shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." Citing § 8 of article 21.21, the Texas court of appeals long ago rejected Allstate's assertion that the State Board of Insurance has "exclusive" power to regulate insurance. *Attorney General of Texas v. Allstate Ins. Co.*, 687 S.W.2d 803, 805 (Tex. App. 1985).[3] Thus, like Florida, Texas law is not hermetically sealed. *Humana*, 525 U.S. at 312.

More importantly, both Florida and Texas expressly allow private suits for disparate impact discrimination. The Florida FHA (Fla. Stat. § 760.35) contains provisions "substantively

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[3] Tex. Ins. Code art. 21.21 § 8 is different from Tex. Ins. Code art. 21.21-8, cited by Allstate. (Pet. 19 n.18)

identical" to the federal FHA. *Loren v. Sasser*, 309 F.3d 1296, 1299 n.9 (11th Cir. 2002), *cert. denied*, 538 U.S. 930 (2003). Florida courts confirm that "[t]he Florida Legislature essentially codified the Federal Act when it enacted the Florida Fair Housing Act." *Dornbach*, 854 So. 2d at 213. Thus, Florida courts have held that, like federal law, the state FHA prohibits both intentional discrimination and "incidental discrimination"—*i.e.*, disparate impact discrimination. *Id.*

Likewise, the Texas FHA explicitly states: "The purposes of this chapter are to . . . provide rights and remedies substantially equivalent to those granted under federal law." Tex. Prop. Code §301.002(3). The Fifth Circuit has recognized that the Texas FHA codified the federal FHA. *Meadowbriar Home for Children v. Gunn*, 81 F.3d 521, 531 n.8 (5th Cir. 1996). No Texas courts have in any way indicated they would depart from federal interpretation of these discrimination laws. Accordingly, the Texas FHA permits disparate impact suits.

Although Florida and Texas have recently passed laws allowing limited credit scoring on insurance policies written after January 1, 2004, the Fifth Circuit recognized that those provisions do not apply retroactively to respondents' claims that all arose prior to 2004. (App. 9a & n.5) Equally important, both of the new state statutes contain provisions prohibiting race discrimination in the use of credit scoring. Fla. Stat. § 626.9741(4)(a) ("An insurer may not request a credit report or score based upon the race, color . . . national origin ... of the applicant or insured."); Tex. Ins. Code art. 21.49-2U § 3(a)(1) ("[a]n insurer may not use a credit score that is computed using factors that constitute unfair discrimination"). In Texas, "unfair discrimination" includes "charging an individual a different rate for the same coverage because of race, color, religion, or national origin." Tex. Ins. Code art 21.21-6 § 3(a). Thus, federal civil rights laws would continue to complement state law as recently amended.

C. The Fifth Circuit Correctly Applied This Court's Decision in *Humana* in Holding that Plaintiffs' Federal Civil Rights Claims Complement, and Do Not Frustrate, Conflict or Interfere with State Regulators Whose Laws Also Prohibit Race Discrimination in Insurance Sales

The panel decision correctly applies the Supreme Court's decision in *Humana*, 525 U.S. 299, interpreting the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The statute provides that: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b).

As the panel correctly held (Op. 4), *Humana*, explicitly rejected "any sort of field preemption" that would free insurance companies from federal law just because the states regulated insurance generally or regulated insurance rates generally. 525 U.S. at 309. *Humana* also rejected the "polar opposite" view that federal law was preempted only when in "direct conflict" with "state regulation." *Id.* at 309-10. Rather, the Supreme Court adopted a middle course that included direct conflict in the test, but also other factors: "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Humana*, 525 U.S. at 310.

The requirement that a particular state law or regulation or "declared state policy" be identified is confirmed by *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1221-23 (11th Cir. 2001) (federal civil rights laws did not "frustrate any declared state policy," because no state law "required, condoned, or suggested that racial distinctions" in selling insurance are acceptable). In trying unsuccessfully to distinguish *Moore*,

Allstate told the Fifth Circuit—without support—that Alabama had and has no administrative regime regulating life insurance rates. (En Banc Pet. 7) Allstate's assertion is contradicted by the insurer in *Moore*, who contended that Alabama had a "carefully crafted scheme of insurance regulation." *Moore*, 267 F.3d at 1220 (holding the state scheme did not condone race discrimination).

Allstate misreads *Humana* (and the panel opinion) in asserting that no "declared (state) policy" or "any enacted (state) law" is required to determine preemption. In fact, "frustrate any declared state policy" are the exact words used by this Court—three times. *Humana*, 525 U.S. at 303, 310, 311. And, the McCarran-Ferguson Act plainly states "any law enacted by any State." 15 U.S.C. § 1012(b). Allstate errs in disregarding plain statutory language.

D. The Fifth Circuit Decision Is Consistent with the Decisions of the Fourth, Sixth, Seventh and Eleventh Circuits and the Conflict Alleged to Exist with the Seventh and Third Circuits Does Not Exist

Contrary to Allstate's assertion, neither the Seventh Circuit nor the Third Circuit has held that FHA disparate impact claims are preempted under the McCarran-Ferguson Act. Allstate relies mainly on *Doe*, 179 F.3d 557. (Pet. 25-27)

In fact, two Seventh Circuit cases upheld suits under § 3604 against McCarran-Ferguson Act preemption. In the *NAACP* case, the Seventh Circuit held that a § 3604 claim was not preempted absent a Wisconsin "law, regulation, or decision" either "requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (***or disparate impact***) does not violate state law." *NAACP*, 978 F.2d at 297 (emphasis added). That decision was reaffirmed by the Seventh Circuit in *United Farm Bureau*, 24 F.3d 1008. The court there held that a federal redlining suit against an Indiana

insurer based on an FHA claim was not preempted by the Act because Indiana did not "require or condone" redlining. *Id.* at 1016.

That brings us back to *Doe*. There, the Seventh Circuit held that the federal disabilities laws were preempted with respect to the "content" of medical insurance policies regulated by the state. *Doe*, 179 F.3d at 563-64. But, the court in *Doe* emphasized that the anti-discrimination provisions of the federal disabilities laws were not preempted as to "access" to insurance—including price. Insurers may be sued for "refusing to sell"—including charging "a higher price." *Id.* at 563. As Judge Posner explained: "Remember that the right of full and equal enjoyment as we interpret it includes the right to buy on equal terms and not just the right to enter the store." *Id.* at 562.[4]

Thus, the Fifth Circuit majority decision is consistent with *Doe* in holding there is no preemption of federal race discrimination claims against insurers for charging higher premiums based on race. The Third Circuit decision in *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), is similarly inapposite. It too dealt with the content of a plan, not access to disability insurance—and never addressed disparate impact claims.

Finally, the Fifth Circuit decision is also consistent with decisions in other circuits holding that the Act does not preempt federal civil rights suits, including § 3604 claims, where, as here, state law did not approve or condone race

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[4] *Doe* reversed a district court decision in Illinois where a state statute barred distinctions in health insurance benefits based on disability "except" where based on "sound actuarial principles." *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1196 (N.D. Ill. 1998). By contrast, race-based distinctions are not condoned by actuarial defenses. As noted earlier, Texas too permits "actuarial" justification but only for disability, age and gender disparities—not race. Tex. Ins. Code art. 21.21-6 §§3-4.

discrimination in the sale of insurance. *Mackey v. Nationwide Ins.*, 724 F.2d 419, 421 (4th Cir. 1984); *NAACP*, 978 F.2d at 297; *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995); *Moore*, 267 F.3d at 1220. Thus, there is no circuit conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE C. DEHOYOS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In our petition, we pointed out (Pet. 22-25) that the court of appeals failed to apply the third prong of this Court's test in *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), for application of Section 2(b) of the McCarran-Ferguson Act (MFA), 15 U.S.C. § 1012(b), and that, as a result, the court of appeals failed to perceive the serious disruption of state insurance regulation that would be caused by extending disparate-impact liability under federal law to the pricing of insurance. Respondents replicate the court of appeals' mistake. But respondents step even further into error: they also argue that there is no real difference between disparate-treatment claims and disparate-impact claims, and that Texas law would allow disparate-impact claims to go forward in any event. As we show below, these contentions lack merit. Also without merit is respondents' argument that the issue of preemption of disparate-impact claims is not properly before the Court.

1. Respondents, Like The Court Of Appeals, Ignore The Third Prong Of *Humana*

In *Humana*, this Court held that a federal law may be applied to insurance only when "[1] federal law does not directly conflict with state regulation, and when [2] application of the federal law would not frustrate any declared state policy or [3] interfere with a State's administrative regime." 525 U.S. at 310 (bracketed numerals added). Respondents correctly quote that test, but then, in the following sentence, ignore the third prong in arguing that *Humana* "require[s] that a particular state law or regulation or 'declared state policy' be identified." Opp. 16. *Humana* requires no such thing. Rather, as is evident from the passage quoted above, *Humana* made clear that, when a federal law "interfere[s] with a State's *administrative regime*," the MFA "preclude[s] its application." 525 U.S. at 310 (emphasis added).[1]

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[1] Respondents accuse petitioners of "misread[ing]" *Humana*, noting that " 'frustrate any declared state policy' are the exact words used by this Court—three times." Opp. 17. True enough—yet *all three times*, the

In so holding, the Court rejected the notion that "Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 309-310. The Court recognized, rather, that in enacting the MFA, Congress intended to protect the primacy of the state regulatory *process* in the field of insurance, not just substantive state policy choices about insurance regulation. Accordingly, the MFA precludes impairment of the *system* of state insurance regulation.[2]

The court of appeals, like respondents, failed to apprehend this central point about the MFA. The court of appeals summarized the *Humana* test as "turn[ing] on one of two axes: (1) the existence of an express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal." Pet. App. 3a. The *Humana* test, however, has three prongs, not two, and the court of appeals failed to apply the third prong. To be sure, the mere *existence* of a system of state insurance regulation is not sufficient for preemption under the MFA; if it were, then no federal law not specifically directed at insurance could ever be applied to insurance, for every State has in place an administrative regime for the regulation of insurance. Preemption thus turns on whether the state administrative system will be *impaired*. *See* Pet. 23. The court of appeals majority failed to grapple with this inquiry at all, as Judge Jones noted in dissent (Pet. App. 13a-19a).

Other courts of appeals have recognized that extending federal disparate-impact liability to insurance would have an enormously disruptive effect on state insurance regulation.

Court followed those words with the test's third prong, twice stated as "interfere with a State's administrative regime" and once as "disturb the State's administrative regime." 525 U.S. at 303, 310, 311.

[2] Respondents cite *Moore* v. *Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001), to support their elision of the third prong. But *Moore* specifically examined whether the relevant statutes "frustrate any declared state policy *or interfere with the state's administrative regime* in the insurance context." 267 F.3d at 1221 (emphasis added).

See Pet. 25-28 (discussing *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), and *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), both of which concluded that the MFA precludes the application of disparate-impact liability under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12182(a), to insurance-benefits caps). Respondents try, but fail, to minimize the force of those decisions. Respondents argue that the decision below "is consistent with *Doe* in holding there is no preemption of federal race discrimination claims against insurers for charging higher premiums based on race." Opp. 18. But this petition is *not* about "race discrimination claims . . . based on race," despite respondents' repeated and erroneous description of petitioners' credit-scoring practices as "race-based." *Id.* at 1, 3. Rather, this petition addresses only claims attacking *race-neutral* insurance practices devoid of racial animus that allegedly produced a disparate impact.

The distinction between race-based (or racially-motivated) and race-neutral practices parallels the line that the Seventh Circuit drew in *Doe* in the disability context. Judge Posner concluded that "to say that an insurance company may not refuse to deal with disabled persons" would not affront the MFA, because "the prohibition of such refusals can probably be administered with relatively little interference with state insurance regulation." *Doe*, 179 F.3d at 564. By contrast, "to require federal courts to determine whether limitations on coverage are actuarially sound . . . obviously would interfere with the administration of the state law" in violation of the MFA and the third prong of the *Humana* test. *Id.* Likewise, the Third Circuit in *Ford* held that an interpretation of the ADA that required insurers to prove the actuarial soundness of their insurance plan—as insurers would need to do in defending against any disparate-impact claim—would produce "a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." 145 F.3d at 612.

Respondents also err in stating that the Seventh Circuit has "twice rejected preemption of . . . disparate impact claims." Opp. 4 (citing *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) and *United Farm Bureau Mut. Ins. Co.* v. *Metropolitan Human Relations Comm'n*, 24 F.3d 1008 (7th Cir. 1994)). This is flatly wrong. Those cases—both of which applied the direct-conflict test rejected in *Humana*—held only that *intentional* discrimination claims were not preempted. Furthermore, the *NAACP* court went out of its way to "assume that the plaintiffs can establish disparate treatment and not just a disparate impact of decisions made on actuarial grounds." 978 F.2d at 290.[3] Judge Easterbrook declined to consider a disparate-impact theory under the Fair Housing Act (FHA) because of "the nature of insurance," which "works best when risks in the pool have similar characteristics." *Id.* Noting that "[r]isk discrimination is not race discrimination," Judge Easterbrook suggested that disparate-impact suits, by placing the burden of proving actuarial justification upon the defendant insurer, are ill-suited to the insurance context. *Id.* at 291. The court below, however, failed to apprehend this important point.

2. Disparate-Treatment And Disparate-Impact Suits Are Not Equivalent

Respondents suggest that disparate-treatment lawsuits are essentially equivalent to disparate-impact suits, and thus

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[3] *United Farm Bureau* also addressed only a disparate-treatment claim, finding no preemption of a policyholder's claim that his insurer "declined to renew his policy because he lived in a racially mixed neighborhood with a perceived high crime rate." 24 F.3d 1008, 1010, 1016. The plaintiff thus alleged that the decision not to insure was based on the racial character of the neighborhood. That is a disparate-treatment claim, not a disparate-impact claim. All the other court of appeals decisions that respondents cite (Opp. 19) also involved claims of intentional discrimination, not disparate impact. *See* Pet. 25. Furthermore, with one exception (*Moore*), each case predates *Humana* and its rejection of the direct-conflict test.

there is no need for particular concern about the disruption of state regulation that would be caused by application of disparate-impact liability to insurance. Respondents argue, for example, that even in a disparate-treatment case, "business necessity would remain subject to judicial review." Opp. 3; *see also* Opp. 12.

Respondents blur the fundamental distinction between disparate-treatment and disparate-impact suits. If a disparate-treatment plaintiff establishes a *prima facie* case that the defendant acted with an improper motive, the burden shifts to the defendant to articulate only a "legitimate, nondiscriminatory reason" for the challenged action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The disparate-treatment defendant need only show that its motive was not a prohibited one—not that its action was a necessary or even a sensible business move. *See Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993) (making clear that, in responding to *prima facie* case, employer may rely on any reason not prohibited by the statute). In other words, the defendant need not show that it *must* undertake the challenged action, but rather that it *may*.

By contrast, a disparate-impact inquiry requires a jury to sift through complex actuarial data to determine whether the defendant *needed* to use credit scoring—or any other ratemaking factor that a plaintiff might challenge. And even if the insurer could meet that burden, jurors would next have to evaluate the plaintiff's proffer of an alternative methodology that did not involve the challenged factor, and would need to determine whether that method would at once (1) reduce the disparate impact, (2) comparably serve the insurer's business needs, and (3) comply with state law. The complexity and intrusiveness of this inquiry could not be more different from the simple motive examination employed in cases of intentional discrimination. As such, asking jurors to undertake it will generate constant, repeated interference with state administrative regimes. *See* Pet. 16-18.

Moreover, because state insurance regulators exercise quasi-legislative powers, they can balance concerns about

disparate impact against other regulatory concerns that affect the public as a whole. *See* Pet. 6. The federal courts cannot. If they are to apply disparate-impact liability to insurance pricing under the MFA, they must rule based on the law and the evidence. Although respondents dispute (Opp. 3 n.1) our observation (Pet. 18) that courts adjudicating disparate-impact lawsuits have "no broad warrant to consider the public interest" but may only adjudicate the rights of the private litigants before the court, this Court has long mandated this approach when applying statutes.[4] "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with common sense and the public weal." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978) (internal quotation marks omitted); *see also id.* at 187 (courts may not take into account "the burden on the public" because they have no "authority to make such fine utilitarian calculations"). Respondents naïvely assume that courts can somehow apply the brakes to federal disparate-impact lawsuits and thereby mimic state regulators' concern for the public interest. In fact, no federal court can do so without overstepping its constitutional bounds.

3. State Law Offers Respondents No Support

Respondents suggest that disparate-impact suits challenging insurance pricing could proceed under *state* law (Opp. 14-15), but they appear to misunderstand the state laws that they cite. As we have noted (Pet. 19 n.18), Texas does have its own fair housing act. Respondents speculate that, because the Texas law resembles the federal FHA, the

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[4] *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), does not say otherwise. Indeed, this Court *rejected* the court of appeals' reliance on "public policy" to justify a deviation from accepted principles of res judicata. *Id.* at 401. The Court noted that "[s]imple justice is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Id.* (internal quotation marks omitted).

Texas law would necessarily allow a disparate-impact suit to go forward if the federal law would. But that argument does not answer the question before this Court—it begs it. Forgetting that their claim pushes the FHA into uncharted territory, respondents assume the answer to the very question that they seek to have resolved in their favor. In fact, no court of appeals—not even the court below—has held that the FHA should be construed to allow disparate-impact suits challenging insurance ratemaking.[5] Given the uncertainty regarding the proper application of *federal* housing law to insurance, the existence of a similar *state* law does not resolve the question.[6] Enacted "to protect state regulation primarily against *inadvertent* federal intrusion," *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996), the MFA is particularly important where, as here, the federal claim advances a highly novel interpretation of federal law.

Respondents also misapprehend our argument regarding Texas Insurance Code article 21.21-6, which proscribes discrimination in insurance practices based on race, color, religion, national origin, age, gender, marital status, geographic location, or disability. Respondents state that, "contrary to Allstate's assertion (Pet. 19), under Texas law, there is no actuarial defense to race discrimination claims[.]" Opp. 14. This is not "contrary to" our argument; it *is* our argu-

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[5] The court below held only that the MFA did not preempt respondents' claim. It did not rule whether the FHA establishes disparate-impact liability in the insurance context. *See* Pet. 15 n.15; *see also* Pet. App. 2a ("The preemptive effect of the [MFA] constitutes the sole point of appeal."), 12a ("We conclude, therefore, that the MFA does not preclude [respondents'] claims.").

[6] Although respondents argue that such state fair housing laws are virtually identical to federal law, they have notably brought no claim under these state laws. Furthermore, respondents have failed to identify, and petitioners are unable to locate, *any* case applying a disparate-impact theory of liability under Texas' fair housing act, much less a case applying such a theory in the insurance context.

ment. As the petition explains (Pet. 19), the absence of an actuarial defense to race discrimination claims (as opposed to claims alleging discrimination based upon age, gender, marital status, geographic location, or disability) demonstrates that the statute reaches only *intentional* racial discrimination, and does not impose disparate-impact liability. Without an actuarial defense to a disparate-impact suit, the defendant would lose every time that a plaintiff could show that a practice affects members of one race more adversely than members of another—an absurd result.

The very fact that Texas, unlike the federal government, has enacted a law specifically addressing insurance discrimination, and providing for actuarial defenses in contexts other than racial discrimination, indicates strongly that Texas' general fair housing act would not be interpreted to trump the provisions of the Texas insurance law. To the extent Florida law may be relevant, the same reasoning applies to its fair housing act, which resembles Texas'.[7] In any event, however state laws are to be reconciled, that question should be resolved by state officials, not federal courts.

Finally, respondents stumble on the recently-enacted Texas law that expressly authorizes credit scoring. *See* Pet. 8-9. Respondents argue that this law "do[es] not apply retroactively." Opp. 15. Respondents, however, seek *prospective* relief enjoining petitioners from future use of credit scoring. Such relief would plainly violate all three prongs of the *Humana* test. *See* Pet. 20. Respondents also ignore this law when they argue that petitioners press this appeal to "avoid disclosure of [their] race-based credit formula." Opp. 3. In fact, the new law *requires* that insurers disclose their

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[7] As we have noted (Pet. 9-10 n.11), Texas law is most directly relevant because the only plaintiffs who purchased homeowners insurance from Allstate are Texas residents. The Florida plaintiffs purchased only automobile insurance and thus cannot proceed under the FHA. Respondents seek certification of a nationwide class action, but such a prospect only establishes that federal disparate-impact liability for insurance pricing could impair the administrative regime of 50 States, not just one.

credit scoring formula to state regulators. *See* Tex. Ins. Code art. 21.49-2U § 9. Upon disclosure, the formula becomes public information. *Id.* § 10.[8] And the Texas Insurance Commissioner has always enjoyed broad subpoena power to require the production of relevant records. *See* Tex. Ins. Code § 36.152.

4. The MFA Question Is Properly Presented And Warrants Review

Contrary to respondents' contention (Opp. 5-6, 12), the question whether the MFA precludes disparate-impact suits (as distinct from disparate-treatment suits) under the FHA in the insurance-pricing context was both raised and decided below. This argument occupied over five pages of petitioners' brief to the court of appeals, under the heading "Plaintiffs' Disparate Impact Claims are Particularly Subject to Preemption." Pet. C.A. Br. 21-26. The court of appeals squarely passed on this argument as well. After noting that petitioners "argue that disparate impact claims are particularly likely to impair state law," the majority concluded that it "d[id] not agree" and criticized the dissent for "reiterat[ing] [petitioners'] argument" without "offer[ing] ... more convincing evidence that disparate impact suits will necessarily impair state insurance regulation." Pet. App. 11a n.7. The issue is therefore properly before this Court. *See United States* v. *Williams*, 504 U.S. 36, 41-43 (1992).

Respondents are equally misguided in suggesting (Opp. 4-6, 11-12) that the fact that this petition arises out of a motion to dismiss somehow renders this petition unsuitable for review. Neither the district court, which granted respondents' motion for leave to file an interlocutory appeal, nor the court of appeals suggested that its determination was hampered by the lack of record. This petition raises ques-

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[8] As *amici* pointed out below, other States have also mandated that insurers relying on credit data submit all related materials, including mathematical formulas, to the State's insurance department for approval. *See* AAI C.A. Amicus Br. 16 n.24 (Indiana, New Mexico, Virginia).

tions of law, not fact. Petitioners do not ask this Court to evaluate the wisdom or fairness of credit scoring, but only that the Court recognize that the MFA entrusts that very determination to expert state regulators and politically accountable state legislatures rather than federal lay juries.

On the other hand, allowing this case to proceed to trial would set a dangerous precedent, encouraging future nationwide class actions by plaintiffs emboldened to extract what Judge Friendly called "blackmail settlements."[9] If the court of appeals' decision remains in force, its ramifications will extend far beyond the judicial opinions that cite it, as risk-averse defendants may choose to change their underwriting practices in the face of threatened litigation, rather than endure costly and intrusive trials. In this way, the threat of litigation will effectively shift the power to regulate insurance away from state commissioners, who are charged with regulating in the public interest, to litigants pursuing private concerns. Disparate-impact suits will thus interfere with state administrative regimes silently and stealthily, by settlement rather than by verdict, but to the same pernicious effect. Given the exceptional importance of this issue, this Court should not—and need not—delay its resolution.

Respectfully submitted,

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[9] Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *see also Parker* v. *Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that the "*in terrorem* effect" of a "potentially enormous aggregate recovery for plaintiffs" may "induce unfair settlements"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that "class certification creates insurmountable pressure on defendants to settle" because "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting that a "small probability of an immense judgment in a class action" produces "intense pressure to settle").

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ALLSTATE CORPORATION, *et al.*,

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JOSE C. DEHOYOS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States ("the Chamber"), a non-profit corporation organized under the laws of the District of Columbia, is the largest federation of business, trade, and professional corporations in the United States. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. The proper interpretation of the McCarran-Ferguson Act, which was enacted to prevent inadvertent federal regulation of insurance that impairs the comprehensive regulation already imposed by the States, is important to the continued vitality of the insurance industry and therefore to the business community as whole. Beyond that, this case raises the important question whether disparate impact claims under the Fair Housing Act (and, by extension, other generally applicable federal civil rights statutes) may be used to challenge, and collaterally attack, insurance companies' use in the underwriting process of facially neutral, actuarially sound, risk-related criteria – including criteria, such as credit history, that have been specifically authorized by state insurance regulators.

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[1] The parties' letters of consent to this filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The fact that a divided panel of the Fifth Circuit, over Judge Jones's vigorous dissent, permitted such claims to proceed in a *putative nationwide class action* only heightens the importance of this case to the business community. Class-action lawsuits, which use procedures and seek remedies that are typically unavailable under state insurance schemes, have been the subject of abuses in recent decades and are of particular concern to the Chamber's members.

This case also raises broader issues about the risk of allowing lay juries to second-guess and reevaluate the rate-making judgments of expert regulators. Litigation such as this impermissibly elevates juries into super-actuaries, inviting federal judges and jurors to use general federal statutes not directed at the insurance business to usurp regulatory functions properly reserved to state legislatures and insurance commissions. This process erodes the important divisions of regulatory authority in our federal system that the McCarran-Ferguson Act was enacted to preserve. The Chamber's members, including those outside the insurance industry, have a substantial interest in preventing that unwelcome development.

STATEMENT

The case presents a question of surpassing importance concerning the meaning of the McCarran-Ferguson Act ("the McCarran Act"), 15 U.S.C. § 1011 *et seq.*, a statute passed by Congress in order to preserve the primacy of state authority over the business of insurance. The Fifth Circuit answered the question presented in a way that is wrong, inconsistent with this Court's decision in *Humana, Inc.* v. *Forsyth*, 525 U.S. 299 (1999), and at odds with the decisions of other circuits. Further review by this Court is needed.

A. The McCarran Act

Before 1944, this Court had "consistently held that the business of insurance was not commerce." *Humana*, 525 U.S. at 306; see, *e.g.*, *Hooper* v. *California*, 155 U.S. 648, 654 (1895). As a consequence, for the first century and a half after

the founding of the Republic the insurance industry was "largely immune from federal regulation." *Humana*, 525 U.S. at 306; see also *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 539 (1978) ("[T]he States enjoyed a virtually exclusive domain over the insurance industry."). Under this regime, "States had a free hand in regulating the dealings between insurers and their policyholders." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969).

In 1944, this Court abruptly changed course, ruling that a fire insurance company that conducted a substantial part of its transactions across state lines was engaged in interstate commerce – and subject to the Sherman Act. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). This decision "provoked widespread concern that the States would no longer be able to engage in * * * effective regulation of the insurance industry." *Barry*, 438 U.S. at 539. In response, Congress "moved quickly" to "restore the supremacy of the States in the realm of insurance regulation" by enacting the McCarran Act in 1945. *Ibid.* Thus, the statute represented "an attempt [by Congress] to turn back the clock" and "to assure that the activities of insurance companies in dealing with their policy holders would remain subject to state regulation." *National Securities*, 393 U.S. at 458.

Congress sought to achieve these goals in two ways. First, Section 1 of the McCarran Act declares that "continued regulation and taxation by the several States of the business of insurance is in the public interest" and that "silence on the part of the Congress shall not be construed to impose *any* barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (emphasis added). This provision alleviated the concern that operation of the so-called "dormant" commerce power would prohibit any state regulation of the insurance industry. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (dormant Commerce Clause applies only where Congress "has not acted or purported to act").

Second, and more important for present purposes, Congress provided in Section 2(a) that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). Congress backed up this commitment to the primacy of state insurance law by broadly providing, in Section 2(b), that federal legislation not specifically related to the business of insurance shall not be "construed to *invalidate, impair, or supersede any* law enacted by *any* State for the purpose of regulating the business of insurance." *Id.* § 1012(b) (emphasis added). Section 2(b) thus "ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana*, 525 U.S. at 306.[2]

B. This Court's Decision in *Humana*

In *Humana* v. *Forsyth*, this Court examined the meaning of the critical, disjunctive terms of Section 2(b) of the McCarran Act: "invalidate," "supersede," or "impair." The case involved a private civil suit brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c). The suit charged a group health insurer with engaging in a pattern of fraud whereby it received discounts for

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[2] In interpreting the McCarran Act, this Court has repeatedly looked to the history and purposes of the statute. See, *e.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946). It has also instructed that the Act should "be read as protecting the right of the States to regulate what they traditionally regulated" – in particular, what Congress regarded (and the statute referred to) as the "business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18, 221 (1979). The Court has "interpreted the term 'business of insurance' in § 2(b) broadly to encompass '[t]he relationship between insurer and insured, the type of policy which could be issued, [and] its reliability, interpretation, and enforcement.'" *Barry*, 438 U.S. at 550-51 (quoting *National Securities*, 393 U.S. at 460). "Certainly the fixing of rates is part of this business * * * ." *National Securities*, 393 U.S. 460.

hospital services that it did not pass on to its policy beneficiaries. The plaintiffs sought treble damages as a remedy.

This Court narrowly ruled that "RICO can be applied *in this case* in harmony with" Nevada's laws governing insurance. 525 U.S. at 303 (emphasis added). In reaching that conclusion, the Court examined the standard of conduct sought to be enforced, the procedural mechanisms, and the available remedies in the underlying RICO action, and compared them with those available under Nevada law. "The acts the policy beneficiaries identify as unlawful under RICO," the Court first explained, "are also unlawful under Nevada law." *Id.* at 308. In addition, the Nevada Unfair Insurance Practices Act not only sets forth an "administrative scheme that prohibits various forms of insurance fraud and misrepresentation" but also authorizes a "private right of action" in the courts for those injured by insurance fraud. *Id.* at 311-12. Similarly, Nevada *common law* imposes an independent duty on insurers to deal with their policyholders fairly and in good faith, and it permits plaintiffs who bring suits for insurance bad faith to recover punitive damages awards that are exempt from the usual Nevada cap of three times compensatory damages. *Id.* at 313. "Accordingly," the Court explained, "plaintiffs seeking relief under Nevada law may be eligible for damages *exceeding* the treble damages available under RICO." *Ibid.* (emphasis added).

In addition to carefully analyzing Nevada law and comparing it to RICO, the Court parsed the text of Section 2(b) of the McCarran Act. "[O]rdinarily," the Court noted, the "term 'invalidate' * * * means to *render ineffective*, generally without providing a replacement rule or law." 525 U.S. at 307 (emphasis added; internal quotations omitted). "'[S]upersede,'" on the other hand, "ordinarily means to displace (and thus render ineffective) while providing a substitute rule." *Ibid.* (internal quotations omitted). Finally, "impair" means "'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" *Id.* at 309-10 (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990)). The Court also drew

support from *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 102 (1983), a preemption case, which concluded that to "'impair' a law is to hinder its operation or 'frustrate [a] goal' of that law." 535 U.S. at 311. In light of this broad definition of "impair," the Court in *Humana* firmly rejected the notion that "impair[ment]" requires a direct conflict between the federal and state provisions. *Id.* at 309 (Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation").

Based on the foregoing analysis, the Court distilled the essence of Section 2(b) into this formula: "When federal regulation does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 535 U.S. at 310. Applying this formulation, the Court concluded that there was "no frustration of state policy in *the RICO litigation at issue here*" (525 U.S. at 313 (emphasis added)), which sought to apply the same standard of conduct, in the same procedural setting (a private lawsuit), as Nevada law would provide, and which sought a remedy that was less than what a Nevada court (or jury) could award.

C. The Proceedings Below

1. This lawsuit was initiated by six individuals as representatives of a putative nationwide class of Allstate policyholders. Pet. 9-10 & n.11. Among other things, respondents alleged that petitioners Allstate Corporation and its subsidiaries (collectively, "Allstate"), had violated the Fair Housing Act ("FHA"), 42 U.S.C. § 3604, by using race-neutral credit-scoring programs in evaluating risk and determining the pricing of Allstate's homeowners' insurance policies. Pet. 9. Allstate's use of credit scoring, respondents alleged, had a disparate impact on non-Caucasians and thus amounted to illegal discrimination under the FHA. *Ibid.* Respondents sought a wide array of remedies, including a declaratory judgment that credit scoring is unlawful, preliminary and permanent injunc-

tive relief, reformation of existing insurance contracts, imposition of a constructive trust upon Allstate's "ill-gotten" gains, attorneys' fees, and punitive damages. C.A. ER 16-21.

Allstate moved to dismiss, contending among other things that the maintenance of respondents' disparate-impact claims under the FHA was precluded by Section 2(b) of the McCarran Act, 15 U.S.C. § 1012(b). Pet. 10. The district court denied the motion to dismiss. Pet. App. 24a-27a.

2. A divided panel of the Fifth Circuit affirmed. Pet. App. 1a-19a. In rejecting Allstate's argument that the McCarran Act precluded respondents' disparate-impact claims under the FHA, the panel majority faulted Allstate for supposedly failing to identify "any law with which the federal civil rights laws conflict" and "any declared regulatory policy which the application of these statutes would frustrate." Pet. App. 8a. The majority also characterized Allstate's argument as nothing more than a variant of "field preemption" (Pet. App. 10a, 11a), even though Allstate (and its supporting *amici*) had argued that the maintenance of respondents' disparate-impact claims would in multiple ways "interfere with" the administrative schemes in Texas, Florida, and other States that regulate the pricing of Allstate's policies.

In dissent, Judge Jones criticized the majority for "interpret[ing] the scope of McCarran-Ferguson preemption too narrowly" and for "misunderst[anding] the intimate connection between plaintiffs' claims and insurance rate-making," noting as well that "insulation of state regulation regarding the fixing of insurance rates from federal law" was "at the very core" of the McCarran Act. Pet. App. 15a, 18a; see note 2, *supra*. Moreover, she explained, the majority was wrong to suggest that *Humana* "require[s] a direct conflict with state law in order to compel preemption." Pet. App. 15a. Instead, she explained, "[i]t is enough that the federal law may 'interfere with a State's administrative regime[]'"– a "clear alternative" that the "majority seems to ignore." *Ibid.* (footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

The McCarran Act embodies the federal government's longstanding commitment to preserving the traditional regulatory autonomy of the States over the insurance business. The Act advances this goal by directing that, as a general matter, federal laws not "specifically relate[d] to the business of insurance" shall not be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Nevertheless, in this litigation, a putative nationwide class action, the respondents are attempting to use the FHA (and other federal anti-discrimination statutes) that do *not* specifically target the business of insurance, to discredit and enjoin the practice of credit scoring – an important insurance rate-making tool that many States (including Texas, whose laws are most immediately implicated here) have chosen to permit.

Further review by this Court is warranted. As Allstate has persuasively demonstrated, this case satisfies all of the traditional criteria of certworthiness. It raises a question of federal law that is of great importance to insurers, policyholders, and state insurance regulators alike: whether the McCarran Act precludes the imposition of "disparate impact" liability in a putative federal class action lawsuit brought under the FHA (or, by extension, other federal civil rights laws), based on an insurance company's use of facially neutral risk factors in its underwriting and pricing decisions. Importantly, these decisions traditionally have been the subject of extensive regulation under state insurance laws. See Pet. 16-21. The Fifth Circuit's divided decision, moreover, deepens a conflict in the circuits over whether such disparate-impact liability contravenes the McCarran Act. See Pet. 25-28. And the lower court's conclusion that the McCarran Act presents no barrier to claims of this kind or to respondents' sprawling federal lawsuit is manifestly incorrect and reflects a fundamental misunderstanding of the statute. Pet. 22-25.

This is reason enough to grant Allstate's petition. But further review is also warranted for two additional reasons, which are described below. First, the decision below is at odds, in several important respects, with this Court's decision in *Humana*. And second, this case is an exceptionally good vehicle for clarifying the scope of the McCarran Act and thus bringing much-needed uniformity to the interpretation of this important federal statute.

ARGUMENT

I. The Fifth Circuit's Decision Ignores The Teachings Of *Humana*

As explained above (at 4-6), this Court in *Humana* carefully examined each of the operative terms of the McCarran Act – "invalidate," "supersede," and "impair" – and set forth a general framework for analyzing issues arising under the statute: "When federal law does not [1] directly conflict with state regulation, and when application of the federal law would not [2] frustrate any declared state policy or [3] interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 525 U.S. at 309-10 (emphasis added). In addition to identifying three distinct ways in which the McCarran Act would preclude the application of a general federal law to the business of insurance, this Court clearly held that the term "impairs" extends beyond situations where federal and state law conflict.

Using this analytical framework, the Court then proceeded to examine carefully the liability standards, the procedural mechanisms, and the remedies available under Nevada law – and compared them with those available in the policyholders' RICO lawsuit. In so doing, the Court assessed the likely impact of the RICO lawsuit not only on individual Nevada statutes but also on the State's "comprehensive administrative regime" as a whole. 525 U.S. at 311-14.

The decision below ignores virtually all of these teachings. To begin with, as Judge Jones correctly noted in her dissent

(Pet. App. 17a & n.4; accord Pet. 11), the panel majority rested its decision in part on circuit cases pre-dating *Humana* that relied on an interpretation of the McCarran Act that *Humana expressly rejected*. See Pet. App. 5a-7a & n.4. Compare, *e.g.*, *Humana*, 525 U.S. at 309 ("[W]e reject * * * that Congress intended a green light for federal regulation whenever federal law does not collide head on with state regulation.") with *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 295-96 (7th Cir. 1992) (holding that the McCarran Act bars application of federal law only where there is an actual conflict between state and federal law), cert. denied, 508 U.S. 907 (1993); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (same), cert. denied, 516 U.S. 1140 (1996).[3] The majority's reliance on lower court decisions that, after *Humana*, no longer remain good law is at best perplexing and at worst indicative of a failure to grasp the import of *Humana*.

The panel majority also disregarded this Court's holding in *Humana* that "impair[ment]" occurs within the meaning of the McCarran Act when a generally applicable federal law "interfere[s] with a State's administrative regime" (525 U.S. at 310). At various points in its opinion, the majority appears "to ignore this clear alternative." Pet. App. 15a (Jones, J., dissenting); *id.* at 15a-16a n.3 (collecting examples). Thus, the majority states (incorrectly) that this Court in *Humana* "emphasized that [McCarran inverse] preemption is to be examined within a 'conflict preemption' rubric, and that, as such, the analysis will turn on one of two axes: (1) the existence of an

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[3] The majority also relied heavily (see Pet. App. 6a) on *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), cert. denied, 122 S. Ct. 1608 (2002), a case that includes a short discussion of *Humana* but also relies on the Seventh Circuit's decision in *NAACP* without recognizing that the rationale of that case did not survive *Humana*. As Allstate points out (Pet. 25), *Moore* involved a claim not of disparate impact but of *intentional* discrimination (disparate treatment). Thus, *Moore*'s holding is not implicated by Allstate's petition.

express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal." Pet. App. 3a. In fact, *Humana* squarely held that the McCarran Act is *not* limited to a conflict preemption rubric, but rather extends as well to interferences with the State's administrative regime falling short of any actual conflict (or frustration of the purposes underlying state law). The majority's suggestion that McCarran Act "preemption" occurs "only * * * where there is a statutory or policy *conflict*" (Pet. App. 10a n.5 (emphasis in original)) is thus flatly inconsistent with an essential holding of *Humana*.

The majority also suggested that any argument that federal law interferes with "a mechanism" the State has "in place for regulating insurance contracts" would fail under *Humana* unless the challenger could identify "a particular state law" that was being impaired. Pet. App. 5a (internal quotations omitted). By "repeatedly, and incorrectly, demanding evidence of 'an enacted law' or 'a declared policy[]'" (Pet. App. 15a (Jones, J., dissenting)), the majority ignored this Court's instruction, in *Humana*, that courts should evaluate the likely impact of federal law on the state "administrative scheme" *as a whole*. And the majority ignored – or overlooked – the fact that this Court conducted just such an analysis in *Humana* itself. See, *e.g.*, 525 U.S. at 311-12 (examining Nevada's "comprehensive administrative scheme" and observing that it is "not hermetically sealed").[4] Had the majority examined the entirety of the Texas insurance scheme, it would have agreed with the dissenting judge that respondents' lawsuit will "interfere with the initial ratemaking as well as the corrective procedures utilized by" the State. Pet. App. 17a.

Finally, and most oddly, the panel's decision to permit this lawsuit to proceed ignores the stark fact that respondents'

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[4] As if that were not enough, the majority's exclusive focus on "enacted laws" ignored this Court's examination, in *Humana*, of Nevada common and decisional law.

disparate-impact claim under the FHA – which seeks a declaration that credit scoring is illegal and an injunction against its future use in insurance pricing decisions – obviously will not only "impair" but also "invalidate" Texas's new statute authorizing the use of credit scoring under certain circumstances. See Pet. 7-9 & n.9, 11 n.13; Pet. App. 18a (dissent). In analogous cases involving federal preemption, it is well settled that state-law damages claims that are imposed for conduct that federal law expressly authorizes are preempted because they frustrate the purposes underlying federal law. See, *e.g.*, *Geier* v. *American Honda*, 529 U.S. 861 (2000); *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25 (1996); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982). The same is true here.

Whether viewed as inconsistencies with this Court's teachings in *Humana*, or simply as reasons why the decision below is wrong, these aspects of the majority's decision demonstrate why this Court's intervention is needed.

II. This Case Represents An Ideal Vehicle For Resolving Issues Left Open In *Humana* And Clarifying The Scope Of The McCarran Act

Humana turned out to be exceedingly easy case to resolve under the legal framework announced by the Court in that case. The reason is straightforward: The standards of conduct, procedures, and remedies involved in the underlying RICO lawsuit in *Humana* were strikingly similar to the substantive standards, procedures, and remedies available under Nevada law. See 525 U.S. at 311-14. Federal and state regimes both prescribed exactly the same standard of conduct (prohibiting fraud by an insurer against a policyholder). Moreover, both regimes contemplated private civil actions as a means of targeting the proscribed conduct. And both regimes allowed the recovery of extraordinary damages. While RICO authorizes private parties to recover treble damages (18 U.S.C. § 1964(c)), Nevada law authorized the recovery of punitive damages (including in excess of three times compensatory damages).

Given these similarities, this Court had no difficulty concluding that Nevada's approach to policing insurance fraud was in no way frustrated – but instead was "complement[ed]" and "advance[d]" (525 U.S. at 313-14) – by allowing the RICO action to proceed. Precisely because *Humana* turned out to be such an easy case to resolve against McCarran Act preclusion, it left important questions unresolved about the reach of Section 2(b) and the meaning of "impairment." More specifically, this Court had no occasion in *Humana* to explain when material differences in federal and state standards of conduct, procedural mechanisms, or available remedies would rise to the level of an "interfere[nce] with a State's administrative regime" under the McCarran Act. 525 U.S. at 310.

This case is an ideal vehicle for addressing this question and, in so doing, bringing greater clarity and uniformity to this important area of federal law. To begin with, the fact that this is a putative nationwide class action means that, unlike in *Humana*, this case involves more than the insurance laws of a single State. That, in turn, means that this case presents a range of different scenarios with respect to the disparities between the (1) relevant standards of conduct, (2) procedural mechanisms, and (3) remedies that respondents seek in this federal lawsuit and those available under state law.

Moreover, with respect to Texas law alone, this case presents far greater differences than existed in *Humana* between the state and federal standards of conduct, procedural mechanisms, and remedies. Thus, this case is an excellent vehicle for illuminating how differences in all three features should be analyzed under the McCarran Act.

1. *The Standards of Conduct.* In contrast to *Humana*, the conduct challenged in respondents' federal lawsuit has *not* been proscribed by state law. Indeed, as noted above, in 2003 Texas joined the majority of States that have expressly *endorsed* the practice of credit scoring, by enacting insurance reform legislation that permits insurers to use credit scoring as one mechanism for determining the risk of loss and thus for setting

reasonable insurance premiums. See Tex. Ins. Code. art. 21.49-2U. Although credit scoring cannot be the sole basis for making a decision on an application, Texas now clearly allows the practice, so long as its use is disclosed to applicants and several other regulatory conditions are satisfied. See *ibid.*; Pet. 9 & n.9.

This carefully balanced regulatory approach differs markedly from the full-scale attack on credit scoring that is the centerpiece of the present litigation. Respondents' central allegation is that credit scoring, although facially race-neutral, has a discriminatory impact on non-Caucasians, and as such violates federal anti-discrimination law. Cplt. ¶¶ 91-96. Accordingly, they seek damages for past uses of the practice as well as an injunction proscribing Allstate from using credit scoring to evaluate risk and set the price of their insurance products in the future. As explained above (at 12), it is difficult to imagine a clearer example of a general federal statute "invalidating" state insurance law.

Moreover, even insofar as respondents seek damages based on conduct that occurred before 2003, Texas's previous regulatory approach is not compatible with the goals of this litigation. At the time this suit was filed, the State did not prohibit the use of credit scoring. Instead, it took an entirely laissez-faire attitude toward the practice, leaving insurers presumptively free to use the practice as they saw fit. And, although the State forbade (as it still does) intentional discrimination in insurance practices on the basis of race, color, and national origin, see Tex. Ins. Code art. 21.21-6, there is simply no indication that state law similarly proscribes unintentional disparate impact discrimination of the sort alleged here. See Pet. 18-19. The fundamental difference between proscribing conduct (as Nevada did with respect to insurance fraud) and not regulating conduct at all (as Texas did here) takes respondents' suit well outside of the rationale of *Humana*.

Indeed, unless and until a state regulator actually declares a practice like credit scoring illegal, it cannot be said that the

"acts the policy beneficiaries identify as unlawful under [federal law] are also unlawful under [state] law." *Id.* at 308. Use of the FHA to brand as unlawful insurance practices that a State has allowed to develop unimpeded would certainly appear to "interfere with a State's administrative regime" in a way objectionable under the McCarran Act. 525 U.S. at 310. This important question, which was not (and could not be) definitively resolved in *Humana*, is present here and warrants this Court's attention.

2. *The Procedural Mechanisms.* Even if Allstate's use of credit scoring might have raised issues under Texas law prior to 2003, that practice could *not* have been challenged through a private civil action. It is clear that Article 21.21-6, the provision of the Texas insurance code that proscribes race and national origin discrimination, does not allow private rights of action of any sort. See *Perez ex rel. Perez* v. *Blue Cross Blue Shield of Texas, Inc.*, 2003 WL 22964281, at *5-6 (Tex. Ct. App. Dec. 18, 2003); see also Pet. 18-19 & n.18. Instead, Texas law sets forth an exclusive system of public administrative redress whereby the State insurance commissioner is empowered to take legal action against insurers engaged in discriminatory practices. See Tex. Ins. Code art. 21.21-6, § 5(a); *id.* arts. 82.001-83.153. In this way, the State has decided to limit the power of courts – and certainly of juries – to sit in judgment of the actuarial judgments of insurers.

And where a State has chosen to resolve claims of discriminatory rate-making through an administrative process that rules out private civil suits, a federal class-action lawsuit alleging such discrimination plainly interferes with, and weakens, the State's administrative scheme.[5] In effect, the lay jury would be

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[5] Certainly, the Texas administrative scheme does not contemplate anything like a nationwide class action. Instead, like any state insurance regulatory regime, Texas's process is narrowly concerned with conduct within the State's own borders, which allows regulators to focus their attention on specific pricing practices and their compatibility with State

asked to apply general federal law to evaluate – and second-guess – the decisions of insurance regulators across the country to approve insurance rates calculated using credit scoring techniques. This represents a direct federal intrusion into regulatory prerogatives that the McCarran Act reserves to the States.[6]

It was for this reason that the *Humana* Court placed importance on the fact that Nevada did provide a private right of action for insurance fraud claims. The existence of such actions, the Court observed, "dilutes the force" of the assertion made by an *amicus* that making private RICO actions available would "cause insurers to be reluctant to settle with state commissioners to avoid compromising defenses" in federal litigation. 525 U.S. at 312 n.10. Here, by contrast, the *absence* of state litigation analogous to the federal suit brings that concern directly to the fore. If insurers face the threat of being sued under federal law based on the disparate impact of their facially neutral rate-making tools, the task of state regulators attempting to set the terms by which such tools can be used – and to take administrative action where they are misused – becomes considerably more difficult.

The Fifth Circuit recognized that Texas law would not allow private damages actions, but inexplicably and improperly dismissed that as irrelevant to the McCarran analysis. Pet. App. 12a (rejecting this argument because "it is well-settled that the

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law and policy. They need not consider the practices of other jurisdictions – as the jury here would be charged with doing were the proposed class certified. This further highlights the vast differences in substance and procedure between this putative federal class action and the remedies available under state law.

[6] As this Court has recognized, jury verdicts have just as much of a regulatory effect as state statutes or administrative regulations. See *Cipollone* v. *Liggett Group Inc.*, 505 U.S. 504, 521 (1992); cf. *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

existence of additional remedies does not create a conflict with state law such that McCarran preemption may be found"). This analysis is misguided in at least two respects. First, this Court in *Humana* expressly rejected the notion that merely the absence of a "conflict" between federal and state law precludes McCarran Act preemption. See 525 U.S. at 309. By focusing solely on whether the presence of private action created a conflict, the Fifth Circuit asked the wrong question.

Second, the court of appeals also seriously overread *Humana*. To be sure, *Humana* does say that federal regulation of insurance is not precluded merely because it attaches additional liability. *Ibid.* It does *not* follow, however, as the Fifth Circuit suggested, that the authorization of a private federal action where no analogous state law action exists is categorically immune from scrutiny under the McCarran Act. In context, this Court's observation was intended to preserve the federal government's authority to impose taxes or fees on insurers beyond those assessed by the States, a decision that hardly affects the States' own regulatory schemes. The disruption is far greater, however, when the federal government trenches upon a State's exclusive power to police the business of insurance by giving private litigants the power to do what the State had previously reserved to its own regulators. Private federal lawsuits strip the States of their ability to set enforcement priorities through the exercise of prosecutorial discretion and encourage citizens to bypass the state administrative process. This represents a fundamental shift in the nature and quality of insurance regulation, which implicates the core concerns of the McCarran Act.

In any event, since *Humana*, most courts that have confronted the question whether federal lawsuits "impair" state insurance regimes that do not allow for private rights of action to challenge insurer conduct have disagreed with the position taken by the Fifth Circuit in this case. See, *e.g.*, *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999) (RICO claim preempted by the McCarran Act because Minne-

sota insurance law allowed only "administrative recourse" and not a private civil action); *In re Managed Care Litigation*, 185 F. Supp.2d 1310, 1321 (S.D. Fla. 2002), 150 F. Supp. 2d 1330, 1340 (S.D. Fla. 2001) (RICO claims barred by the McCarran Act where analogous state insurance regime offered no private right of action); *Am. Chiropractic Ass'n, Inc.* v. *Trigon Healthcare, Inc.*, 151 F. Supp. 2d 723 (W.D. Va. 2001) (same); *Wineinger* v. *United Healthcare Ins. Co.*, 2000 WL 1277629, at *7-8 (D. Neb. Feb. 16, 2000) (same). This Court's grant of review in this case would allow clarification of this important subsidiary question and resolve the split created by the Fifth Circuit's unreasoned decision.

3. *The Remedies*. The *third* important divergence between federal and state law in this case concerns the far-reaching remedies that respondents are seeking. Under Texas law, the insurance commissioner pursuing a discrimination claim may seek administrative orders directing an insurer to return the premium to a policyholder, to pay restitution, or to cease and desist from certain practices. The commissioner may also levy regulatory fines or suspend an insurer's license. In this suit, however, respondents are seeking much more: nationwide preliminary and permanent equitable relief, enjoining the use of credit scoring wherever Allstate uses it; reformation of existing insurance contracts, attorneys' fees, litigation costs, and – perhaps most importantly – punitive damages. See C.A. ER 16-21. By contrast, in *Humana*, plaintiffs were seeking only treble damages against a state law backdrop that allowed private plaintiffs to recover punitive damages in excess of three times the amount of the compensatory award. Because the divergence of remedies here is vastly greater than in *Humana*, this case presents the Court with a valuable opportunity to clarify the circumstances in which remedial differences rise to the level of an impairment under the McCarran Act.

* * *

Because this case is a putative nationwide class action, respondents are seeking to challenge the use of credit scoring

not merely in Texas, where the suit was filed, but in every State where Allstate does business. The obvious aim of this suit is to impose a blanket federal prohibition on credit scoring – by means of litigation rather than legislation – that would wholly supplant the decisions of state regulators regarding this particular rate-making tool. This is altogether inappropriate. Whether or not credit scoring is (as many States have concluded) an important actuarial tool, Congress enacted the McCarran Act precisely to protect the authority of the States against such inadvertent federal incursions.

The effect – and indeed the purpose – of litigation such as this is to transfer control over this critical aspect of the insurance business from expert State regulators to plaintiffs' lawyers, federal judges, and lay juries. By devolving regulatory authority from professional rate-makers – who are charged with considering *both* the public's interest in fair and non-discriminatory insurance practices as well as the industry's need for sound actuarial devices that accurately measure risk and thereby keep rates fair for everyone – to lawyers and jurors, who are charged only with considering the facts of a particular case, lawsuits such as this can only make regulation less predicable and more expensive.[7]

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[7] Two related reasons make this devolution particularly worrisome. First, respondents' lawsuit is a collateral attack on the rate-making process. As this Court has often observed, "[r]ate-making is essentially a legislative function." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945). It requires the decisionmaker to "survey the field" and to "regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 366 (1994). Accordingly, courts "are scarcely equipped to oversee, without the initial superintendence of a regulatory agency, rate structures and practices." *Ibid.* For precisely that reason, many States recognize the "filed rate" doctrine, which precludes judicial reexamination of duly filed rates and tariffs. Second, the "relation of insured to insurer" and "the underwriting and spreading of risk" lies at the very "core of the McCarran-Ferguson Act's concern." *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25, 39 (1996); *Royal Drug*, 440 U.S. at 218 n.18, 221; see also note 2, *supra*; Pet. App. 18a (Jones, J., dissenting).

If permitted to proceed, the present litigation would require a single federal court to wade through oceans of actuarial and statistical data in order to assess whether the practice of credit scoring is required by business necessity in any of the States where it is used by Allstate and, if so, whether there is an alternative available under the pricing systems in place in the fifty States that would have a less disparate impact. By its very nature, this gargantuan task would not involve the careful, state-specific focus that expert insurance regulators take when considering whether and under what conditions to allow particular rate-making techniques within their borders. Such a fundamental displacement of regulatory perspectives and prerogatives ought to count as an impairment of state regimes.

When a single federal class action threatens to undermine the multitudinous decisions that individual States have made (or are considering making) about the propriety of a ratemaking practice, the fundamentally decentralized character of American insurance regulation is destroyed. Such an accidental yet profound shift in the federal-state balance of power offends the core purpose of the McCarran Act and subverts the important federalism values the Act was enacted to protect.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States

ALLSTATE CORPORATION, et al.,
Petitioners,

v.

JOSE C. DeHOYOS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici, the principal trade associations for the property and casualty insurance industry in the United States, have a major stake in this case. The court below held that a putative national class has the right to rely on a federal law that is not specifically related to insurance to challenge the actuarially sound use of credit information for insurance ratemaking purposes. Many of *Amici*'s members are, or are considering, using credit data for these purposes.

Under the decision below, Respondents will be permitted to pursue their claims under the Fair Housing Act ("FHA"), 42 U.S.C. § 3604, based on, *inter alia*, the so-called "disparate impact" standard. *Amici* respectfully submit this brief to support the position that the use of valid, facially neutral credit information in the underwriting and pricing of insurance – a practice that is expressly authorized by federal and state law for use in the business of insurance – cannot, as a matter of law, give rise to liability predicated on a standard of disparate impact.[1]

SUMMARY OF ARGUMENT

This Court held in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), that if a federal law does not specifically relate to the business of insurance, the McCarran-Ferguson Act ("MFA"), 15 U.S.C. § 1012(b), permits the application of that law to insurance if, and only if: (1) the federal law "does not directly conflict with state regulation," (2) application of the law "would not frustrate any declared state policy," and

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than the *amici curiae*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

(3) application of the law would not "interfere with a State's administrative regime." 525 U.S. at 310. In this case, a majority of the court below misconstrued the relationship between the MFA and the FHA, a statute that indisputably does not specifically relate to the business of insurance. The crux of the majority's error was in apparently assuming that the FHA could provide the basis for the Respondents' alleged causes of action predicated on a purportedly discriminatory "disparate impact" of race-neutral underwriting criteria.

The implications of this assumption for State regulation of insurance, expressly reserved to the States by the MFA, merit this Court's immediate review. The disparate impact theory, as applied by the courts under certain civil rights laws, is wholly inappropriate in the context of State regulation of insurance. Each and every State prohibits insurers from intentionally discriminating in underwriting and pricing based on race or national origin. At the same time, State insurance law expressly requires insurers to base their underwriting and ratemaking on factors that are predictive of risk of loss. Under State insurance law, "unfair discrimination" includes *both* (1) charging rates that are not based on sound actuarial data reflecting policyholders' anticipated risks of loss *and* (2) intentionally basing rates on the race, creed, color, ethnicity, or national origin of a policyholder. *See, e.g.*, Tex. Ins. Code art. 21.21-6, §§ 3-4.

In compliance with State law, *Amici*'s members base their underwriting and ratemaking decisions on factors that never include consideration of race, creed, color, ethnicity, or national origin. Indeed, insurers do not request any information about such factors. Rather, insurers rely on race-neutral factors such as, in the homeowners insurance context specifically, claims history of applicant, construction material(s), loss history of property, roofing material, and, as relevant here, applicant credit history.

Based on more than a decade of loss experience, the insurance industry has found that there is a direct relationship between financial stability and risk. *See* NATIONAL ASS'N OF INSURANCE COMMISSIONERS, REPORT ON CREDIT REPORTS AND INSURANCE UNDERWRITING 4 (1997). This relationship has been affirmed by numerous studies, which have concluded that the use of credit information is an effective and useful risk-predictive tool. Recognizing the risk-predictive value of credit data, a large majority of the States have enacted legislation authorizing, in some cases with carefully designed limitations, the use of such data for underwriting and ratemaking purposes. A majority of the court below, however, ignored these State laws in suggesting that Petitioner could, without any intent to discriminate on the basis of race, be held liable for racial discrimination under the FHA because it used credit data for risk-assessment purposes. This majority's failure to recognize the significance of State law in relation to the application of a federal statute not "specifically relate[d] to the business of insurance" was in direct contravention of the MFA. 15 U.S.C. § 1012(b).

Credit information is only one risk-predictive factor that, under the disparate impact theory, could lead to judicial contravention of the MFA. Any number of actuarially sound risk-predictive factors, including dwelling characteristics or claims history, could conceivably correlate statistically with race (or another protected classification) in certain circumstances. But that statistical correlation cannot support an inference that a facially neutral, actuarially justified underwriting or pricing decision reflects any consideration of race, ethnicity, etc. The disparate impact test is thus fundamentally ill-suited to analyzing claims of racial discrimination in the insurance context.

Forcing insurers to defend against charges of disparate impact would subject them to potentially frequent, unwarranted litigation, including possible national class

actions such as this. More significantly, a judicial determination regarding the validity of an insurer's actuarial defense to disparate impact charges would necessarily entangle the courts in issues that are by law exclusively within the province of individual State insurance regulators. Federal judicial involvement based on federal law would necessarily displace State insurance regulators vested with exclusive authority (subject to State judicial review) to determine the propriety of insurance rates, thereby frustrating a declared State policy. By depriving those regulators of the ability to exercise their quasi-legislative discretion granted by State law, application of federal law would interfere with every State's insurance regime. Under this Court's ruling in *Humana*, any such injection of judicial authority is impermissible under the MFA.

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERALISM, AND ITS REVIEW WILL ALLOW THE COURT TO CLARIFY ITS DECISION IN *HUMANA V. FORSYTH*.

When Congress enacted the MFA in 1945, it expressly declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Section 2(b) of the MFA provides, in pertinent part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]" 15 U.S.C. § 1012(b). Prior to and since the enactment of the MFA, the substantive regulation of

property-casualty insurance has remained the exclusive province of the States and their administrative agencies.[2]

In *Humana*, this Court held that if a federal law does not specifically relate to the business of insurance, the MFA will allow the application of that law to insurance if, and only if: (1) the federal law "does not directly conflict with state regulation," (2) application of the law "would not frustrate any declared state policy," and (3) application of the law would not "interfere with a State's administrative regime." 525 U.S. at 310. It is undisputed that the FHA does not specifically relate to the business of insurance.[3] Nevertheless, in the proceedings below, a majority of the Fifth Circuit panel apparently assumed the FHA could possibly provide the basis for the Respondents' alleged causes of action predicated on a purportedly discriminatory "disparate impact" of race-neutral underwriting criteria.[4] That assumption is fundamentally at odds with State insurance regulation, which, as discussed further below, requires insurers to underwrite and rate insurance policies based on race-neutral factors predictive of risk. Because, as this Court noted in *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 710 n.20 (1978), "[e]ven a completely neutral practice will

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[2] This is in marked contrast to the other areas of the financial services industries, *viz.*, banking and securities, which are regulated extensively by the federal government and its agencies. There is, of course, no general insurance regulatory authority at the federal level.

[3] *See Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360-61 (6th Cir. 1995); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir. 1992).

[4] This Court has not specifically ruled regarding whether the disparate impact standard applies to claims brought under the FHA. *See Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (expressly declining to condone the use of disparate impact theory under the FHA). This case presents the opportunity for the Court to settle this question in the negative, specifically with respect to insurance.

inevitably have *some* disproportionate impact on one group or another" (emphasis in original), the application of the disparate impact test to insurance could effectively open up the entire State-regulated insurance-ratemaking process to federal judicial intervention, in violation of the fundamental purposes of the MFA.

If this Court allows the Fifth Circuit's decision to stand, federal judges in the Fifth Circuit, and possibly throughout the nation, could find themselves in the inappropriate position of a "super actuary" in a plethora of cases alleging an unfair "disparate impact" in the pricing of insurance products. Opening the courthouse doors to FHA claims against insurers based on the disparate impact theory would invite litigants, even absent any basis for alleging an intentional violation, to initiate lawsuits challenging the use of virtually any facially neutral criterion for underwriting or pricing of homeowners insurance. Faced with such claims, the federal courts will be forced to engage in a quasi-legislative task of determining the appropriate underwriting and pricing of homeowner's insurance policies. This untenable result is flatly at odds with the MFA.

For the foregoing reasons, this case presents an extremely important issue of federalism upon which this Court should rule. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'") (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

II. USE OF THE DISPARATE IMPACT STANDARD IS WHOLLY INAPPROPRIATE IN THE CONTEXT OF INSURANCE.[5]

A. State Insurance Laws Require the Use of Actuarially Sound, Risk-Predictive Underwriting Criteria.

State insurance laws throughout the nation prohibit insurers from charging rates that are "excessive, inadequate, unreasonable, or unfairly discriminatory."[6] Under State insurance law, a rate is generally not deemed "unfairly

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[5] "Underwriting" is the process whereby an insurance company gathers information and decides whether or not it will insure the applicant. "Rating" or "ratemaking" is the process that determines how much a policyholder pays for the insurance. For economy, we at times use the term "underwriting" to refer to both underwriting and ratemaking unless a distinction is important in the context.

[6] *See* Tex. Ins. Code arts. 5.142, 5.13-2; *see also* Ala. Code § 27-13-65; Alaska Stat. § 21.39.030; Ariz. Rev. Stat. § 20-356; Ark. Code Ann. § 23-67-208; Cal. Ins. Code § 1861.05; Colo. Rev. Stat. Ann. § 10-4-403; Conn. Gen. Stat. Ann. § 38a-686; Del. Code Ann. tit. 18, § 2503; D.C. Code Ann. § 31-3508(e); Fla. Stat. Ann. § 627.062; Ga. Code Ann. § 33-9-4; Haw. Rev. Stat. Ann. § 431:14-103; Idaho Code § 41-1405; Ind. Code Ann. § 27-1-22-3; Iowa Code Ann. § 515F.4; Kan. Stat. Ann. § 40-953; Ky. Rev. Stat. Ann. § 304.13-031; La. Rev. Stat. Ann. § 22:1404; Me. Rev. Stat. Ann. tit. 24-A, § 2303; Md. Code Ann., Ins. § 11-205; Mass. Gen. Laws Ann. ch. 175A, § 5; Mich. Comp. Laws Ann. § 500.2109; Minn. Stat. Ann. § 70A.04; Miss. Code Ann. § 83-2-3; Mo. Ann. Stat. § 379.318; Mont. Code Ann. § 33-16-201; Neb. Rev. Stat. § 44-7510; Nev. § 686B.050; N.H. Rev. Stat. Ann. § 414:3; N.J. Stat. Ann. § 17:29AA-10; N.M. Stat. Ann. § 59A-17-6; N.Y. Ins. Law § 2303; N.C. Gen. Stat. § 58-40-20; N.D. Cent. Code § 26.1-25-03; Ohio Rev. Code Ann. § 3937.02; Okla. Stat. Ann. tit. 36, § 902; Or. Rev. Stat. § 737.310; 40 Pa. Cons. Stat. Ann. § 1183; R.I. Gen. Laws § 27-44-5; S.C. Code Ann. § 38-73-330; S.D. Codified Laws § 58-24-5; Tenn. Code Ann. § 56-5-303; Utah Code Ann. § 31A-19a-201; Vt. Stat. Ann. tit. 8, § 4685; Va. Code Ann. § 38.2-1904; Wash. Rev. Code Ann. § 48.19.020; W. Va. Code § 33-20-3; Wis. Stat. Ann. § 625.11; Wyo. Stat. Ann. § 26-14-105.

discriminatory" if it (1) is based on sound actuarial principles or bears a reasonable relationship to the expected loss and expense experience among risk, *and* (2) is not intentionally based on race, color, religion, national origin, or another protected classification.[7]

To comply with State insurance laws regarding actuarially sound risk classification, insurers must seek to determine rates that most accurately measure loss potential. *See Gen. Ins. Co. of Am. v. Bowen*, 196 N.E. 774 (Ohio 1935) (insurance policies that resulted "'in a different annual rate for the same risk or similar risks in the same class'" were in violation of basic insurance laws) (internal citation omitted); 5 LEE RUSS & THOMAS SEGALIA, COUCH ON INSURANCE § 69:32 (3d ed. 2003) (State laws "declare that all deviations shall be uniform as to risks and classes"). Actuarial science accomplishes this task by segmenting groups of individuals expected to have similar risks of loss.[8] By grouping a policyholder with others with a similar risk profile, based on the greatest number of identifiable risk-related factors available, insurers are able to offer the most fair price for particular insurance products and to offer coverage to people they might have otherwise declined. Common homeowners insurance risk-predictive factors include claim history of applicant, construction material(s), distance from fire station, existence of fire suppression devices, home-based business presence and type, lead paint potential (for homes constructed

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[7] *See, e.g.*, Tex. Ins. Code art. 21.21-6 §§ 3, 4; Haw. Rev. Stat. Ann. § 431:14-103(a); Iowa Code Ann. § 515F.4(2)&(3); Me. Rev. Stat. Ann. tit. 24-A, § 2303(1); Miss. Code Ann. § 83-2-3.

[8] Casualty and Actuarial Society, Statement of Principles Regarding Property and Casualty insurance Ratemaking, at Principle 4 (adopted 1988), *available at* http://www.casact.org/standards/princip/sppcrate.pdf ("A rate is reasonable and not excessive, inadequate or unfairly discriminatory if it is an actuarially sound estimate of the expected value of all future costs associated with an individual risk transfer.").

pre-1978), loss history of property, roofing material, security system, and, as relevant here, credit-based insurance scores. Insurers do *not* underwrite homeowners insurance based on classifications typically deemed protected under the civil rights laws, including race or ethnicity. Indeed, homeowners insurers do not even request information regarding such classifications.[9]

However, any number of well-accepted, facially neutral insurance rating factors, including, for example, property loss history or dwelling proximity to firehouse, could conceivably correlate statistically with demographic groupings in certain circumstances. It is this potential incidence of correlation that renders the disparate impact test inappropriate in the context of insurance. As the Seventh Circuit queried in *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287, 291 (7th Cir. 1992), how could you know whether "a higher rate per $1,000 of coverage for fire insurance in an inner city neighborhood [is] attributable to risks of arson or to racial animus?" Yet, " '[i]f insurance premiums are to remain at reasonable levels for most householders, some insurers must be permitted to reject risks which are perceived to be excessively high, while charging higher premiums on some risks than upon others.' . . . [C]lassification of risks is important to insurance, and assigning higher rates to greater risks differs from assigning rates by race." *NAACP*, 978 F.2d at 298 (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984)). Simply put, "[r]isk discrimination is not race discrimination." *Id.* at 290.

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[9] This is in contrast to banking, where lenders are required to request data on racial classifications under the Home Mortgage Disclosure Act, 12 U.S.C. § 2801 *et seq.*, and the Federal Reserve's Regulation C promulgated thereunder, 12 C.F.R. § 203 *et seq.*

The disparate impact theory is thus inappropriate in the context of the business of insurance. Application of the theory in this context would necessarily lead to perverse consequences in a variety of circumstances. Dwelling distance from firehouse, for example, might correlate statistically with race of homeowner in some circumstances, and yet plainly could affect risk of loss.[10] Likewise, while insurers are authorized under State laws to consider smoking as a factor when underwriting certain forms of insurance, *see, e.g., Mut. Benefit Life Ins. Co. v. JMR Elec. Corp.*, 848 F.2d 30, 31 (2d Cir. 1988) (smoker's misrepresentation regarding his history of smoking was material and thus insurer could rescind insurance policy); 6 COUCH ON INSURANCE § 88:23 (3d ed. 2003) ("In light of the many modern reports of the adverse health consequences that may flow from direct use of tobacco, . . . many insurers offer different rates to smokers and nonsmokers."), the incidence of smoking is not uniform across different racial or ethnic groups, for example, and thus has a disparate impact on such groups. *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, A REPORT OF THE SURGEON GENERAL, TOBACCO USE AMONG U.S. RACIAL/ETHNIC MINORITY GROUPS 88 (1998) (showing prevalence of cigarette smoking among adults who are

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[10] Notably, the States may always, explicitly by legislation, restrict underwriting practices – even ones that are actuarially justified – that they find objectionable on public policy grounds. Aside from prohibitions on considering factors such as race, color, religion, etc., States have periodically also restricted the use of other underwriting criteria that may bear on risk but are deemed contrary to public policy. For example, at least two States prohibit the use of age of home to some extent as a factor in underwriting. *See, e.g.*, 28 Tex. Admin. Code § 21.1006 ("An insurer may not decline to write residential property insurance based on the age of the property sought to be insured."); Conn. Agencies Regs. § 38a-824-3 (it is "unfair discrimination" to refuse to underwrite or cancel homeowners insurance "solely because of the age of structure"). But no State statute prohibits the use of otherwise-permissible rating factors based on a "disparate impact" approach.

African Americans (26.5%), American Indians/Alaska Natives (36.0%), Asian American/Pacific Islanders (14.2%), Hispanics (18%), and Whites (26.4%)).[11] Moreover, there is no reason to believe that race- or gender-neutral underwriting criteria will generally inure to the benefit of Caucasians or men, as opposed to historically disadvantaged or protected classes. *See id.* (showing that 28.1% of White males were smokers (and thus subject to higher insurance rates), while only 14.6% of Hispanic females and 5.4% of Asian American/Pacific Islander females were smokers). Smoking, or a dwelling's distance from a firehouse, are only two examples of the numerous insurance rating factors that are neutral with respect to race, ethnicity, etc., but might conceivably correlate statistically with race or another FHA-protected classification.

With respect to the underwriting practice at issue in this case, the insurance industry has found that there is a "direct relationship between financial stability and risk." NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, REPORT ON CREDIT REPORTS AND INSURANCE UNDERWRITING 4 (1997). This relationship has been affirmed by numerous studies, which have concluded that the use of credit information as a risk factor is an effective and useful loss-predicting tool.[12] Thus, an overwhelming majority of States

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[11] *Available at* http://www.cdc.gov/tobacco/sgr/sgr_1998/sgr-min-pdf/sgr-all.pdf.

[12] *See, e.g.*, Va. State Corp. Comm'n Bureau of Ins., *Use of Credit Reports in Underwriting* at 2 (1999) ("In every case where insurers have proposed to use credit scoring as a rating factor and have been able to provide sufficient data to the Bureau's actuaries, the use of credit scoring has been found to be statistically correlated to losses."); University of Texas McCombs School of Business, Bureau of Business Research, *A Statistical Analysis of the Relationship Between Credit History and Insurance Losses* at 13 (March 2003) (finding a highly significant relationship between credit history and insurance losses, and asserting that "[t]he lower a named insured's credit score, the higher the probability that

(footnote continued on next page)

permit insurers' use of credit data for this purpose, and at least thirty-nine States have enacted legislation specifically addressing the proper role of credit information in the insurance risk-assessment process.[13] The States are continuing to develop, consistent with their overall objective that their citizens have available to them affordable insurance

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(footnote continued from previous page)

the policyholder will incur losses on an automobile insurance policy, and the higher the expected loss on the policy."); EPIC Actuaries, Michael J. Miller and Richard A. Smith, *The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity* (June 2003) (finding not only a correlation between credit-based insurance scores and propensity for loss, but also that insurance scores are consistently among the most important variables used by insurers); James E. Monaghan, *The Impact of Personal Credit History on Loss Performance in Personal Lines*, Actuarial Society Forum (Winter 2000) (finding clear evidence of a strong correlation between credit history and future loss performance); Tillinghast-Towers Perrin, Study on Insurance Bureau Scores vs. Loss Ratio Relativities for Fair, Isaac & Co. (Dec. 10, 1996) (finding very strong evidence of correlation between Insurance Bureau Scores based on consumer credit information and loss ratio relativities); American Academy of Actuaries, *The Use of Credit History for Personal Lines of Insurance: Report to the National Association of Insurance Commissioners* at 3 (Nov. 2002) (finding that "credit history can be used effectively to differentiate between groups of policyholders and therefore it is an effective tool.").

[13] *See* NATIONAL ASS'N OF INSURANCE COMMISSIONERS, USE OF CREDIT REPORTS/SCORING IN UNDERWRITING (Nov. 2003) (chart attached as Appendix hereto). A significant number of these States have adopted legislation based on the National Conference of Insurance Legislators' ("NCOIL") Model Act Regarding Use of Credit Information in Personal Insurance. *See* National Conference of Insurance Legislators, NCOILetter, *NCOIL Clarifies Insurance Scoring 'Sole Use' Provisions* (January 2004), *available at* http://www.ncoil.org (reporting that sixteen States have adopted laws based on the NCOIL model); *see also, e.g.*, Fla. Stat. Ann. § 626.9741; Ga. Code Ann. § 33-24-90, *et seq.*; Ind. Code Ann. § 27-2-21-1, *et seq.*; La. Rev. Stat. Ann. § 22:1481, *et seq.*; Neb. Rev. Stat. § 44-7701, *et seq.*; Okla. Stat. Ann. tit. 36, § 950, *et seq.*

coverage,[14] particular rules regarding insurers' use of credit scores. The decision below, however, may effectively preempt State insurance legislators and regulators from going through their own technical analyses of credit data as an aid to underwriting and ratemaking, including by weighing consumer and industry input on the issue through their individual legislative and regulatory deliberative processes. Such a result is directly at odds with the MFA, in which Congress, recognizing the individual policy interests of the States with respect to the development and enforcement of their particular insurance regimes, expressly prohibited the courts from interfering with State insurance regulation by application of federal law, absent a clear Congressional directive to the contrary.

B. A Proper Application of *Humana* Shows That the MFA Bars the Use of the Disparate Impact Test Under the FHA.

In light of the foregoing background on State insurance laws, it is apparent that the majority below misapplied this Court's holding in *Humana*. Adjudication of Respondents' disparate impact claims would necessarily "conflict" with a State law, "frustrate" declared State policy, *and* "interfere" with State administrative regimes. *See* 525 U.S. at 310; *see also LaBarre v. Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999) (upholding decision to bar claims under the MFA where federal law would

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[14] *See, e.g.*, Actuarial Standards Board, *Actuarial Standard of Practice No. 12, Concerning Risk Classification, available at* http://www.actuarialstandardsboard.org/pdf/asops/asop012_014.pdf (Oct. 12, 1989) (noting that "[i]n a voluntary market system, risk classification is vital to ensure the equity and financial soundness of the system" and that the ability to "permit economic incentives to operate and thereby encourage widespread availability of coverage" is a primary purpose of risk classification).

frustrate, "perhaps even supplant [the State's] carefully developed scheme of regulation") (quoting *Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1308 (8th Cir. 1997)).

First, unlike the "administrative scheme" complained of in *Humana*, which was alleged to be unlawful under both Nevada and federal law, the Respondents in this case allege violations of federal law only. Respondents here could not allege a violation of State law because there clearly is no violation. Indeed, subsequent to the filing of this suit, Texas enacted a law that expressly permits credit scoring in insurance underwriting under certain conditions. *See* Pet. at 20. But, even prior to such enactment, Texas and every other State required insurers to base their underwriting and ratemaking practices on risk discrimination supported by sound actuarial data. *See, e.g.*, Tex. Ins. Code art. 21.21-6 § 4, discussed *supra*. Thus here, unlike in *Humana*, the federal law at issue, *i.e.*, the FHA, under the disparate impact theory, would actually "proscribe conduct that the State's laws governing insurance permit." 525 U.S. at 303. And, unlike the conduct at issue in *Humana*, where "[t]he acts the policy beneficiaries identif[ied] as unlawful under RICO [were] also unlawful under Nevada law," there is no such symmetry here. *See id.* at 308. Accordingly, unlike the laws at issue in *Humana*, the federal and state laws here *do* directly conflict, and the MFA therefore plainly precludes the application of the FHA in this case. *See id.*

Second, application of the disparate impact test to insurance underwriting and ratemaking would undoubtedly "frustrate" the declared policy of essentially every State in the Union. As set forth above, the policy of State insurance laws is to avoid "unfair discrimination" (*vis-à-vis* equal risks) and the "adverse selection" that will inevitably result from policies that fail to adequately measure and compensate for

differences in known risks.[15] Under *Humana*, "[w]hen federal law is applied *in aid or enhancement* of state regulation," the MFA will not bar action under the federal statute. *Id.* at 303 (emphasis added). In this case, the twin State goals of "fair discrimination" and avoidance of "adverse selection" would be neither aided nor enhanced by application of the disparate impact standard – indeed, they would manifestly be adversely affected. Accordingly, application of that standard under the FHA would plainly frustrate the States' declared policies embedded in basic insurance laws.

Finally, the application of the disparate impact test by federal judges under the FHA would wreak havoc on the States' insurance regulatory regimes. Under the disparate impact standard, once a plaintiff has made out a *prima facie* case of disparate impact, the defendant must bear the burden of producing evidence that its challenged practice is based on "legitimate business reasons" or "business necessity." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988). Even if that burden can be met, the plaintiff nevertheless may prevail if he can "show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the [defendant's] legitimate interest [relating to the challenged practice]." *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)). Thus, each court in a disparate impact suit involving insurance would be required to usurp the state insurance

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[15] "Adverse selection" occurs when insurers are unable to charge sufficiently risk-based prices for policyholders with different risk profiles. When an insurer raises premium levels to account for the higher risk policyholders in such a case, those with lower-than-average risks may seek insurance elsewhere, or forego insurance coverage altogether. This leaves only the premiums from higher risk policyholders to cover claims, thereby undermining the risk-spreading purpose of insurance. "The role of insurance underwriters is to minimize adverse selection." ROBERT J. GIBBONS, 1 INSURANCE PERSPECTIVES 69 (1st ed. 1992).

regulators' quasi-legislative role in determining the proper underwriting and rating for whatever form of insurance is at issue. *Cf. Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998) ("[W]e will not construe section 501(c) [of the Americans with Disabilities Act] to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff. . . . [R]equiring insurers to justify their coverage plans elevates this court to the position of super-actuary."). Such a result would be an affront to this Court's determination in *Humana* that Congress clearly did *not* intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation." 525 U.S. at 309. The majority below apparently disregarded this Court's caution in that regard. Indeed, in her dissenting opinion, Judge Jones admonished the majority for failing to grasp the basic purposes of the MFA and this Court's holding in *Humana*. She stated:

> The McCarran-Ferguson Act was designed precisely to prevent this type of federal interference with the states' prerogative of insurance regulation. The majority have not only misunderstood the intimate connection between the [Respondents]' claims and insurance rate-making, but they have also interpreted the scope of McCarran-Ferguson preemption too narrowly, and they have misapplied lower court precedents. . . .
>
> Disparate impact claims under the Fair Housing Act are, in my view, squarely

preempted by the McCarran-Ferguson Act and by *Humana*.[16]

Because it is not possible to make any valid inference from "disparate impact" evidence that risk-based underwriting or pricing reflects any consideration of race or another prohibited factor, there is no sound rationale for application of the disparate impact standard to claims of unlawful discrimination in insurance. Not only would use of the standard in this context inappropriately vest the courts with the quasi-legislative task of determining what rates an insurer should charge, *see Nationwide Mut. Ins. Co. v. Williams*, 188 So. 2d 368, 372 (Fla. Dist. Ct. App. 1966) ("Insurance rate-making is a technical, complicated, and involved procedure" and the courts are to give "just credence to the judgment of the Insurance Commissioner who specializes in the field of insurance."), but more importantly, any such injection of judicial authority into the overall fabric of State insurance law regulatory system would demonstrably "impair" State insurance law in contravention of the MFA. *See Humana*, 525 U.S. at 309-10.

III. THE USE OF FACIALLY NEUTRAL CREDIT INFORMATION FOR INSURANCE PURPOSES IS EXPRESSLY AUTHORIZED BY FEDERAL LAW.

The FHA, which never mentions discrimination in insurance at all (and therefore might reasonably be construed not to regulate such discrimination under any theory, *see Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 423 (4th Cir. 1984)), obviously makes no mention of the use of credit data for insurance purposes. Under the MFA, such FHA silence alone should lead the courts generally to defer to State laws

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[16] 345 F.3d at 301, 303 (Jones, J., dissenting).

and regulations on the matter. However, to the extent any ambiguity as to the intent of Congress remains, it is highly relevant that the use of credit data for insurance purposes is expressly authorized under the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*

The FCRA was enacted to regulate the use of information compiled by credit reporting agencies as a means of "meeting the needs of commerce for consumer credit, personnel, *insurance*, and other information in a manner which is fair and equitable to the consumer." *Id.* at § 1681(b) (emphasis added). Recognizing the value of credit report information for insurance underwriting purposes, Congress included the use of such information "in connection with the underwriting of insurance" as a "permissible purpose" for credit reporting agencies' sharing data with insurers. *Id.* at § 1681b(a)(3)(C). The FCRA also authorizes insurers to take certain "adverse action" based upon credit information, including "an increase in any charge for . . . any insurance," *id.* at § 1681a(k)(1)(B)(i), as long as certain notice requirements are satisfied. *Id.* at § 1681m(a).

As discussed above, since the early 1990s, insurance companies have increasingly found credit information to be a highly accurate predictor of future losses, and thus policyholder risk. Insurers, such as *Amici's* members, rely on actuaries to undertake the complex process of predicting future losses and expenses and allocating those costs among the various classes of policyholders. Actuaries employ statistical analysis and judgment in pricing insurance, using loss and expense data that assist the actuary in estimating the expected costs of insuring a given set of exposures. These exposures can be grouped into various classes according to characteristics that the group members share in common, but only if such a grouping relates to the risk of future loss for its members. To the extent that a classification relates to the risk of loss, that classification is deemed "predictive" of future

loss. It is on the basis of sound risk classification that the premium charged for the transfer of risk is fair and equitable according to the risk of loss each class presents.

Amici's members and other insurers have found credit information a sound basis for the creation of risk-predictive scoring models. Credit-based scoring allows insurance companies to use a variety of objective characteristics from the policyholder's credit history, such as past payment history and length of credit history, to determine coverage risk. The scoring model assigns a numerical score that ranges from risks with the worst expected loss performance to risks with the best expected loss performance. For *Amici's* members and other insurers, these methods of risk assessment are means of achieving compliance with the dictates of both actuarial discipline and State insurance law to underwrite and price insurance based on risk.

The foregoing was known to Congress when, only a few months ago, it enacted the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"), Pub. L. No. 108-159, 117 Stat. 1952, which amended the FCRA. The FACT Act, among other things, affirms the legitimacy of credit-based insurance scores under federal law by leaving § 1681b(a)(3)(C) of the FCRA unchanged with respect to the permissible uses of credit data for insurance underwriting. Moreover, Congress included in the FACT Act a new "savings clause" with respect to credit-based insurance scores. Section 212(e) of the FACT Act, which amended FCRA § 1681t, provides that certain provisions of the FCRA and the FACT Act "shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance." In light of this express recent statement on this issue, it would be a direct affront to Congress to interpret the

silence of the FHA as authorizing federal intervention in the insurance industry in respect of the use of credit data. Congress has not only precluded Respondents' disparate impact claims by its directives on insurance regulation generally in the MFA, but it has also expressly underscored the MFA's directives in this regard, specifically with respect to regulation of insurers' use of credit data, in the current FCRA.[17]

CONCLUSION

For all the foregoing reasons, *Amici* respectfully urge that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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March 26, 2004

[17] This issue was not addressed by the Fifth Circuit because its opinion was published on September 3, 2003, while the FACT Act was enacted three months later on December 4, 2003.

APPENDIX

APPENDIX

NAIC's Compendium of State Laws on Insurance Topics

USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
AL	No provision			Reg. 482-1-127	Personal lines	Make procedures used to obtain credit reports and insurance scores available to commissioner. If use credit scoring, file the scoring model with the commissioner. May not calculate score based on lack of credit history. May not use credit score as sole reason to deny coverage or refuse to renew.
				SB 271 pending (2003) **DIED**	*Property and casualty*	*An insurer may not base an underwriting decision, in whole or in part, on a credit report.*

USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
AK	§§ 21.36.120, 21.36.150, 21.39.030	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	SB 13 (2003) (Eff. 1/1/04) (Codified as §§ 21.36.460, 21.39.035)	Personal lines	If use credit information in underwriting or rating, disclose that fact at the time the application is taken. Must consider in combination with other factors. May not consider absence of credit history or medical accounts. File credit scoring model with commissioner.
				HB 85, SB 64 pending (2003) (Carry over to 2004)	*Consumer reporting agencies*	*Consumer reporting agency shall provide complete file to consumer on request without charge.*

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USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
AZ	§ 20-448	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 44-1692 § § 20-2102, 20-2109 to 20-2110 *HB 2183 pending (2003)* **DIED**	Alt lines Property and casualty *Property and casualty*	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting. Must provide specific reasons for adverse decision based on credit history or credit score. *May not use credit history to determine rates or eligibility for coverage unless models to calculate are filed with the commissioner. May not consider absence of credit or medical industry codes.*

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USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
				HB 2032 (2003) (Eff. 8/31/04) (Codified as § 20-2110)	All lines	In the event of an adverse underwriting decision, provide the specific reasons. If based on credit-related information, must decide factors that were primary cause. May not use the following credit-related factors for property or casualty premiums: absence of credit history, credit history based on collection of medical bills, total available credit, etc.
				SB 1265 (2003) (Eff. 12/31/03) (Codified as § 20-1652	Property and casualty	Must get credit information promptly; cannot cancel or decline coverage more than 30 days after date of application based on credit report.

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USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
AR	§ 23-66-205, 23-66-206	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 23-66-317 (Repealed eff. 1/1/04)	Personal lines	Auto insurer may not refuse to issue or renew coverage or limit coverage solely upon the applicant's credit history unless the credit report reveals an increased hazard and the insurer or its agent sends written notice to the applicant explaining the insurer's actions.
				Directive 2-2002	Personal lines property and casualty	May not refuse to issue or renew coverage based solely on credit report unless report shows substantially increased risk to insurer and insured is given notice. If insurer relies on credit scoring, system must be filed with department.

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USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
				SB 846 (2003) (Eff. 1/1/04) (Codified as §§ 23-67-401 to 23-67-415)	Personal lines P/C	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)

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USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

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STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
CÃ	Ins. § 790.93	Life	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Civ. §§ 1785.10 to 1785.11	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting. Agency must notify consumer of rights and provide copy of file, including any credit score used.
				AB 800 pending (2003) (Passed Senate, held in Assembly)	*Consumer reporting agencies*	*Amends Civ. § 1785.25 to state that the credit reporting agency may only furnish information (if it reasonably knows the information is accurate and complete.*

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	Reg. tit. 10 § 2632.5	Private auto	Credit scores are not listed as an allowable auto rating factor.	Civ. § 1786.18	All lines	May not include specified information in an investigative report except when used in underwriting life insurance expected to amount to $250,000 or more.
				Bulletin 76-3	All lines	Users of credit reports who deny insurance or increase the prices charged on the basis of information contained in the reports must disclose the information that was the basis for the adverse decision.
				SB 64 pending (2003) (Passed Senate, Held in Assembly)	*Home owners*	*An insurer may not use credit ratings, credit reports or other credit information to underwrite or rate policies.*

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				AB 3 pending (2003)		*Consumer credit reporting agency must remove derogatory information more than 7 years old. Credit score may not be affected by number of inquiries. Provide one free copy of report to consumers yearly.*
				SB 691 pending (2003) (Passed Senate)	*Homeowners*	*May not use credit history to underwrite a risk.*

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CO	§ 10-3-1 104	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 22-14.3-103	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting. Must notify consumers that will be using credit report for determination of eligibility for coverage or to determine premiums.
				§ 12-14.3-105.3	Life	May use credit report in underwriting life insurance expected to amount to $100,000 or more.

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				Reg. 5-1-16	Personal auto, homeowners, non-commercial fire, mobile home owners	Safeguards and standards for proper use of credit information. May not use credit information as sole basis for underwriting or refusing to renew. Insurer must written guidelines that are consistently applied. Must provide notice to consumers advising them that credit information will be used for underwriting/rating.
				HB 03-1273 (2003) (Eff. 7/1/04) (Codified as § 10-4-616)	Auto	Disclose to a consumer that a credit score will be considered, the range of scores, and how the score is calculated.

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CT	§ 38a-816, 38a-818	Disability specifically addressed; commissioner may pursue undefined unfair practices.	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Guidelines for the Examination of Financial History Measurement Programs for Personal Risk Insurance Underwriting and Rating Plans.	All lines	File measurement tools with the department. May only be used for new business. May not consider lack of credit history. Demonstrate coordination with expected risk of loss. Disclosure to customer.
				AB 5490 pending (2003) **DIED**	*All lines*	*May not use credit history for underwriting or setting rates.*

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DE	tit. 18 § 2304	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Reg. tit. 18 § 906	Personal lines	May not use credit report or score unless the company has obtained authority to do so in its rate filing. File supporting information showing it is actuarially supported and is not the sole basis for denying coverage or assigning the consumer to a premium class. May not assign a higher rate because the consumer has no credit history. May not use obsolete history. Provide notice to consumers of use of credit history. Models filed with the commissioner shall be considered as confidential proprietary information.
DC	no provision			No provision		

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FL	§ 626.9541	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Reg. 4-125.004	All lines	An insurer shall notify an insurance applicant in writing, or in the same medium as the application, that a credit report will or may be requested as part of the application process. If the application is denied, the insurer must tell the applicant in the notice of the denial how a copy of the credit report can be obtained so the applicant can identify the items that resulted in the denial.

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FL (cont'd)				SB 40-A (Codified as § 626.9741) (Eff. 1/1/04)	Personal lines auto and homeowners	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
				SB 42-A (Codified as § 627.9742) (Eff. 1/1/04)	Open records law	Credit scoring methodologies are trade secrets and confidential and exempt from public record requirements.

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FL (cont'd)				*HB 233 pending (2003)* **DIED**	*Personal lines*	*May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department.* (NCOIL model)

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FL (cont'd)				*SB 204 pending (2003)* **GOVERNOR VETOED**	*Auto and homeowners*	*Notify consumers that the credit report will be considered; may not use as sole criteria for adverse underwriting decision. May not consider absence of credit history or problems resulting from medical bills, must provide information to insurance department showing credit history is a reasonable predictor of insurance risk. Must review score after 2 years or earlier if requested by consumer. Implementation contingent on passage of HR 1895, which provides a public records exception for credit scoring methodology.*

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GA	§ 33-6-4	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Reg. 120-2-15	Private passenger auto, residential property	Insurer may cancel, nonrenew or decline a policy based on an individual's credit report. Insurer shall file this information quarterly with the commissioner. Insurer shall provide notice and the specific reason for the decision to the insured.
				Reg. 120-2-65	Private passenger auto	An insurer shall not use underwriting criteria or guidelines that result in the fictitious grouping of risks and results in unfair discrimination. The use of credit reports in determining an applicant's or insured's acceptability for coverage may create fictitious grouping and unfair discrimination.

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				HB 215 (2003) (Codified as §§ 33-24-90 to 33-24-98)	Personal lines P/C	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)

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HI	§ 431:13-103	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 431:10C-207	Auto	Insurer shall not base standard or rating plan upon a person's credit bureau rating.
ID	§ 41-1313	Life, disability	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Bulletin 91-9	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.

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				§ 41-1843	Property or casualty	May not charge a higher rate or cancel coverage based primarily on a credit rating or credit history.
				Ins. Reg. 19	Personal lines property or casualty	Aggregate weight given to noncredit factors must be at least as great as the aggregate weight given to credit factors. Items identified as trade secrets are not subject to public disclosure. Insurers must retain documentation for 5 years.
IL	No provision			215 ILCS 5/155.38	Personal lines	May not refuse to issue or renew a policy solely on the basis of a credit report. Provide policyholder with notice.
				HB 502, SB 92 pending (2003)	*Homeowners and renters insurance*	*May not consider credit score.*

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				HB 1640 (2003) (Eff. 10/1/03)	Personal lines P/C	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
				HB 3661 (2003)		Amends HB 1640 to require a certification that the treatment is actuarially justified.
				HB 2378 pending (2003)	*Credit reporting agencies*	*Establishes the duties of credit reporting agencies.*

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				SB 818 pending (2003)	*Personal lines P/C*	*May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. Methodology considered a trade secret under IL law. May not sell any data or lists regarding credit inquiries or credit reports. (Based on NCOIL model)*

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IN	§ 27-4-1-4	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 25-1-22-25	Personal auto	May not charge higher rate because policyholder has filed bankruptcy petition.

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				Bulletin 111 (July 1, 2002)	Personal lines property and casualty	Submit to insurance department information on how credit information is utilized in underwriting, including the factors from a credit report that are included in a credit score, the computer model used to determine a credit score, any underwriting guidelines related to the use of credit scores and documentation to demonstrate the correlation between credit information and expected risk of loss. May not use credit scores after 10/1x/02 unless the information is filed with the department.

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				SB 178 (2003)	Personal lines property and casualty	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
				HB 1634, HB 1187 pending (2003) **DIED**	*Personal lines property and casualty*	*May not use credit score to underwrite or rate a policy.*

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IA	§ 507B.4	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Reg. § 191-20.12	Auto and homeowners	May not underwrite or cancel based solely on credit report or scores. Commissioner may request copy of factors used in decision and the model used in credit scoring.
KS	§ 40-2404	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Concurrent Resolution 1623 (2002)		Study the issue and report to 2003 legislature.

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	§ 40-2, 112	All lines	Insurer submitting an adverse underwriting decision shall either provide, in writing, the applicant, policyholder or individual with the specific reason for the decision or advise the person that they may receive the reason in writing.	HB 2071 (2003) (Eff. for policies issued 1/1/04 and later) (Codified as §§ 40-5101 to 40-5114)	Personal lines P/C	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
	§ 40-953	Property and casualty	Rates shall not be unfairly discriminatory. Differences in rates must reflect the differences in risk with reasonable accuracy.			

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KY	§ 304.12-080	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 304.20-040	Auto	May not refuse to issue or renew a policy solely because of credit history, or lack of credit history of the applicant.
	Dept. policy	All lines	Underwriting guidelines must be in written form and filed with the Dept. of Insurance. The guidelines must be used uniformly.			

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LA	§ 22:1214	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 22:1214(7)(i)	Auto liability	Prohibits an insurer from terminating, refusing to renew or refusing to issue insurance because the insured has declared bankruptcy.
				HB 53, HB 58, HB 118, SB 206 pending (2003) **DIED**	*Auto and homeowners*	*Use of credit reports and credit scores is an unfair trade practice.*

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				HB 1448 (2003) (Codified as §§ 22:1481 to 22:1494)	Personal lines P/C	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
				HB 1107 pending (2003) **DIED**	*Auto and homeowners*	*May not use credit score in underwriting homeowner's insurance. May use for auto only to rate a new policy. Limits on the considerations that may be included.*

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ME	tit. 24 § 2159	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	tit. 10 § 1313-A	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.
				tit. 24-A § 2917	All lines	Insurer must notify policyholder of reason intend to nonrenew, such as "credit report."
				LD 470 (2003) (Codified as tit. 24-A § 2169-B)	Personal lines auto and property and casualty	May not use an insurance score calculated using income, gender, ZIP code, religion, etc. or raise rates based solely on credit score. Provide notice to consumer.

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				LD 556 (2003) (Codified as tit. 10 § 1315)	Credit reporting agencies	Disclose procedures to consumers to correct inaccurate credit reports.
MD	Ins. § 27-208	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Ins. § 27-501	Private auto	May not refuse to underwrite based solely on credit history.

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				Commercial § 14-1202	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting. Insurers that use credit reports or credit scores must provide the commissioner with underlying information so the commissioner can ensure that reports are used in accordance with the law. Must notify consumers of actual reason for an adverse action.

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				Reg. 31.15.11	Personal lines property and casualty	May not use credit history to rate or refuse to underwrite homeowners coverage. May not use credit history to refuse to renew an auto policy or increase its premium. May use credit history to rate a new auto policy. Advise applicant that credit history is being used. May not consider the absence of a credit history as a factor.
				Ins. § 27-501	Personal lines property and casualty	*Would amend § 27-501 by deleting the provision that allows credit history to raise the premium for auto.*

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				SB 444 pending (2003) **DIED**		*Would amend § 27-501 by requiring permission of the applicant to use credit history.*
				SB 174 pending (2003) **DIED**		
				Ins. § 11-317	Private auto	Must provide a policyholder statement on rating factors. If use credit scoring, explain how it may cause an increase in premiums.
				Bulletin 02-14, 02-16	Personal lines property and casualty	Address questions in implementation.

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MA	ch. 176D	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory. Department does not allow credit scoring, based on Unfair Trade Practices Act.	§ 93:51	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.
				§ 93:62	Insurance for personal, family or household purposes	If coverage is denied or price increased because of credit report, must notify consumer of right to receive a credit report.

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				Regulation pending (2003) **WITHDRAWN**	*Personal lines property and casualty*	
MI	§§ 500.2019, 500.2020, 500.2027	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Bulletin 2003-01-INS	Personal lines	File formula used to compute credit score with the department. Must recalculate credit score at least yearly.
				Bulletin 2003-02-INS	Personal lines	Revises 2003-01-INS to require rescoring only at the request of the policyholder. Notify consumers of their score and the discount tier they are in.

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	§ 500.2110a	All lines	If uniformly applied to all its insureds, an insurer may establish a premium discount plan. Insurers utilize this provision to justify using credit scores.	*HB 4268, SB 191 pending (2003)*	*Auto and homeowners*	*May not rate based on credit history or lack thereof.*
				SB 473 pending (2003)	*Auto and health care*	*Premium discount plan shall not be based in whole or in part upon an applicant's or insured's lack of credit history.*

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MN	§ 72A.20	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 72A.20 subd. 36	Private passenger auto and homeowners	May not reject, cancel or nonrenew a policy solely on the basis of credit information. If will use credit information, must notify consumer. If use a credit scoring system, must have methodology on file with the commissioner.
				HF 76 pending (2003)	*Auto and homeowners*	*Prohibits use of credit information.*
				HF 946 (2003) (Codified as § 72a.501 subdivision 2)	Property and casualty	Code sections limiting collection of information do not apply to credit scoring, as long as the agent informs the policyholder.

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MS	§§ 83-5-35, 83-5-45	Life, health specifically mentioned; commissioner may pursue undefined unfair practices.	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Reg. 2003-1	Personal lines	Insurer must make available to the department on request the insurer's specific written procedures detailing its practices regarding credit history and credit scores. If depends on credit scores, file model with commissioner prior to use. May not base on lack of credit history or use as only factor in decision to cancel or non-renew notice requirements.

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MO	§ 375.936	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Reg. tit. 20 § 500-9. 100	Homeowner	Insurer must inform the Dept. of Insurance that it is using credit history as an underwriting guideline.
				§ 375.918	Personal lines property and casualty	May not use credit report or credit score as the sole rating factor. Must disclose the fact that will gather credit information. Must inform applicant if credit score or report adversely affected him.

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				HB 259 pending (2003) **DIED**	*Auto or personal property*	*Would amend § 375.918 to broaden its provisions from underwriting to "any other insurance purpose."*
				SB 670 pending (2003) **DIED**	*Credit reporting agencies*	*May not determine credit risk in whole or in part by the number of inquiries posted.*
MT	§§ 33-12-206, 33-18-210	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 31-3-111	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.

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				§ 33-18-210	Auto, homeowners	An insurer may not refuse to insure or refuse to renew, charge higher rates or limit the scope of coverage based on credit history unless related to the risk of the insured.
				SB 349 pending (2003) **DIED**	Personal lines	*May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department.* (NCOIL model)

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				HB 184 pending (2003) **DIED**	*Personal lines*	*May not cancel or refuse to renew existing coverage based on credit score. May not use score as sole basis to deny coverage. File credit scoring methodology with commissioner. Provide consumer notice if take adverse action based on credit information*
				HB 332 pending (2003) **DIED**	*Auto and homeowners*	*May not use credit score as a rating factor.*
NE	§ 44-5019	Property, casualty	Rating systems shall not produce premiums that are excessive, inadequate or unfairly discriminatory.	§ 44-7516.01	*Private passenger auto*	Policy must be accompanied by disclosure stating if any credit-based rating was used to determine rate charged for coverage.

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	§ 44-1525	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	LB 487 (2003)	Personal lines	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
				LB 693 pending (2003) **DIED**	*Homeowners, renters, auto*	*It is an unfair trade practice to use credit scores.*

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NV	§§ 686A.100, 686A.170	Life, health specifically mentioned; commissioner may pursue undefined unfair practices.	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	SB 319 (2003)	Personal lines	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. (NCOIL model)
				AB 194 pending (2003) **DIED**	*All lines except surety*	*May not use credit reports in underwriting insurance.*

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NH	§ 417:4	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 359-B:4	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.
				§ 359-B:5	Life	May use credit report in underwriting life insurance expected to amount to $50,000 or more.

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				§ 412:14-a	Auto	Use of credit reports, credit histories and credit scoring for underwriting purposes shall be based upon objective and measurable standards with appropriate consumer protections.
				HB 557 pending (2003) **DIED**		*Would revise § 412:14-a by forbidding the use of credit history.*
				§ 414:3	Fire, certain casualty	Use of credit reports, credit histories and credit scoring for underwriting purposes shall be based upon objective and measurable standards with appropriate consumer protections.

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				Reg. Ins. 1401.08	Auto	Unsubstantiated information developed by credit or character investigations shall not be relied on in making decisions on whether to write or renew coverage.
				Reg. Ins. 3301.01 to 3310.02	Auto and homeowners	If use credit scoring, must establish written standards to prevent discrimination and submit scoring model to the insurance department for review.

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NJ	§§ 17:29B-4, 17:29B-9	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 56:11-31	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.
				Department Policy (See website for informational booklet)	Auto	The department does not approve filings that include a credit scoring component.

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NM	§§ 59A-16-11, 59A-16-17	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Bulletin 2002-001	All lines	All insurers that use credit scoring in underwriting or rate making must submit all portions of the programs that include the use of credit scoring.
				SB 325, HB 598 pending (2003) **DIED**	*Auto*	*May not use credit history to raise the premium for a new or existing policy or to cancel an existing policy.*
NY	Ins. Law §§ 2301 to 2302	All lines	Rates shall not be excessive or discriminatory.	General Business *§ 380-i*	All lines	Requires users of consumer reports to advise the consumer of adverse action taken in reliance on the report.

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				OGC Opinion No. 96-1	Homeowners	Must give specific reasons for cancellation.
				AB 2661 pending (2003)	*Homeowners*	*May not use credit history information to decide whether to issue or renew a policy.*
				AB 4730 pending (2003)	*All lines*	*It is an unfair trade practice to consider credit information in setting premiums.*
				AB 4754 (Passed Assembly), SB 2728 pending (2003)	*All lines*	*May not use credit history in underwriting.*
				AB 6281, SB 3186 pending (2003)	*Auto*	*May not use credit history in deciding whether to issue or renew coverage. May not request a credit report.*

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				AB 7419 pending (2003	*Consumer reporting agencies*	*Consumer may request a consumer reporting agency not to release any information about him.*
				SB 356 pending (2003)	*Consumer reporting agencies*	*Most data can only be disclosed for 3 years instead of the current 7 years.*
NC	§ 58-63-15	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	*HB 596 pending (2003)* **DIED**	*Private passenger auto*	May not base rates on credit reports.

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				SB 771 (2003) (Eff. 1/1/04) (Codified as § 58-36-90)	Private passenger auto	May not use credit reports as sole rating factor. Must notify consumer if will be used. File scoring models with insurance department.
ND	§ 26.1-04-03	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	*HB 1290 pending (2003)* **DIED**	*Property and casualty*	*May not use credit scoring as the sole basis to decline or refuse to renew a policy or to increase or decrease a premium more than 15%. If use credit report, provide free copy to insured.*

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				HB 1260 (2003) (Codified as §§ 26.1-25.1-01 to 26.1-25.1-11)	Personal lines	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)

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OH	§ 3901.21	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Bulletin 26	*Auto substandard risks*	If a substandard risk classification relies on a credit report, that report should be attached to the dailies of the policies issued. The Ohio Dept. will periodically inspect.
				Bulletin 2002-2	*Property and casualty*	Insurers must establish that credit history and credit scores are valid risk characteristics. May not use for discriminatory purposes.
				SB 48 pending (2003)	*Homeowners*	*Using a credit score in connection with homeowner's insurance is an unfair trade practice.*

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				Reg. 3901-1-55	Personal lines	Prohibits insurers from using credit information as the sole basis for underwriting and rating decisions. Disclosure to consumers required.
OK	tit. 36 § 1204	All lines	There shall not be discrimination in favor of particular persons having substantially like insuring risk and exposure factors or expense elements in the terms or conditions of any insurance contract or in the rate or amount of premium charged.	Guidelines adopted by Oklahoma State Board for Property and casualty Rates 9/27/01	*Property and casualty insurance*	Insurers that use credit history or credit scores must provide the board with underlying information to show they are using the information in accordance with OK law. Notify the insured of any adverse action taken as a result of the credit history or credit score.

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				SB 539 (2003) (Codified as tit. 36 §§ 950 to 959)	Personal lines	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. (NCOIL model)
				HB 1659 pending (2003) (Carries over to 2004)	*Property and casualty*	*May not use credit history.*
				SB 684 pending (2003) (Carries over to 2004)	*Credit, homeowners, life, auto*	*May not use insurance score that includes the address or ZIP code as a factor.*

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				HB 1629 pending (2003) (Carries over to 2004)	*Auto*	*May not use credit history.*
OR	§ 746.015	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 746.635	All lines	Insurer, agent or insurance support organization may not prepare or request an investigative consumer report about a person involving an insurance transaction unless the insurer or agent informs the person that he may request to be interviewed in connection with the preparation of the report and that the person may request a copy of the report.

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				Reg. §§ 836-080-0425 to 836-080-0440	Personal lines P/C	Must disclose to consumer that credit history will be used. Notice if adverse action based on credit score; explain how to dispute finding.

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				SB 260 (2003) (Eff. 1/1/04)	Personal lines	If adverse underwriting decision, provide consumer with specific reasons. If based on credit score, include specifics of at least 4 reasons for score. Provide information on how to dispute. May use credit history only in combination with other factors to decline coverage. May not consider absence of history, number of inquiries, total available credit, etc. Consumer may request yearly re-rating. File scoring models with dept.

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				SB 280, SB 484 pending (2003) **DIED**	*Personal lines*	*May not use credit history to cancel or nonrenewal personal insurance. May use to decline coverage only in combination with other factors.Iıncludes a list of factors insurers may not consider.*
PA	§ 40-29-105	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	*SB 198 pending (2003)*	*Personal lines*	*May not use credit history to deny, cancel or refuse to renew coverage. May adjust rates based on credit history in combination with other factors. Authority to adopt regulations.*
				SB 331 pending (2003)	*Personal lines P/C*	May not use credit scoring to underwrite coverage.

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				SB 336 pending (2003)	*Auto*	May not use credit scoring.
				SB 337 pending (2003)	*All lines*	May not use credit score in underwriting.
RI	§ 27-29-4	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 6-13.1-21	All lines	May not request a credit report without first notifying the insurance applicant. If deny coverage or charge more, must notify consumers that is due to credit report.

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				§§ 27-6-53, 27-9-56	Homeowners and personal auto	May use credit scoring for rating and underwriting only if the insurer demonstrates the predictive nature of the score to the insurance department. If requested by customer, must do new credit score every 2 years and lower rates if score is better. May not use revised score to raise rates except as noted.
				SB 137, HB 5362 (2003) (Eff. 1/4/04)	Homeowners and auto	Amends above statute to state that rates may only be changed at time of renewal. List of factors that may not be considered. Reporting agency may not sell data or lists that include information about credit report.

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				HB 5709 pending (2003) Bulletin 2002-16	*All lines*	*May not request credit report in connection with a consumer's application for insurance.* Explains 2002 law.
SC	§ 38-57-120	Life, health	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 38-73-740	Auto	Credit report used as basis for rate classification must be kept on file by the insurer for 3 years, and be available to the applicant.

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				Bulletin 2002-04	Private passenger auto	May not refuse to insure, cancel or non- renew based solely on credit history or credit score. A filing including credit scoring must include justification. Disclose to consumer that insurer may gather and consider credit information.
				SB 49 pending (2003) (Carries over to 2004)	All lines	*May not consider credit reports or credit rating.*

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SD	§§ 58-33-12, 58-33-13, 58-33-38	Life, health specifically mentioned; commissioner may pursue undefined unfair practices.	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Bulletin 2002-3	Personal lines property and casualty	May not use credit information as the sole rating factor.
TN	§ 56-8-104	Life, health, fire	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Department Policy	All lines	Justification for use of credit scoring must be provided in the filing. Credit scoring cannot be the sole basis for determining rates.

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				SB 122, HB 284 pending (2003) (Carries over to 2004)	*Homeowners*	*May not base rates on credit information.*
				HB 711, SB 638 pending (2003) (Carries over to 2004)	*All lines*	*May not charge higher rate based primarily on credit score.*
				HB 22, SB 1616 pending (2003) (Carries over to 2004)	*Personal lines*	*May not charge higher rate based primarily on credit score.*
				HB 1445, SB 1713 pending (2003) (Carries over to 2004)	*Credit reporting agencies*	*Must give a free copy of credit report to consumer yearly under certain circumstances.*

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TX	I.C. art. 21-21	Life	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory	Business and Commerce § 20.02	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.
				Business and Commerce § 20.05	Life	May use credit report in underwriting life insurance expected to have a value of $150,000 or more.
				SB 310 (2003)	Residential property	File information on credit scoring along with other rating information. Information is confidential.

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				HB 45, HB 81, HB 870, HB 115, HB 331, HB 600, HB 800, SB 91, SB 99, SB 400, HB 696 pending (2003) **DIED**	*Auto, homeowners, farm/ranch*	*May not use credit score.*
				SB 14 (2003) (Codified as art. 21.49-2U)	Auto, homeowners, personal watercraft and recreational vehicles	May not base decision wholly on credit report. May not consider absence of credit history. May not use listed negative factors. Disclose to applicants; notice of adverse decision. Credit scoring model is public information.

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				Reg. 28 TAC § 5.9940 to 5.9941	Personal lines	Disclosure statement for consumers on how score is calculated, right to appeal, requirement for actuarial justification.
				HB 265, SB 130 pending (2003) **DIED**	*Auto, homeowners, farm/ranch residential fire*	*If use credit reports, must provide disclosures to customers. May not use credit information as sole rating factor; may not consider medical information. May not consider absence of credit history.*
				HB 259 pending (2003) **DIED**	*Auto, homeowners, farm/ranch residential fire*	*File credit scoring model with dept. for approval prior to use. Filing becomes public information.*

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				HB 920 pending (2003) **DIED**	*Auto, homeowners, farm/ranch, non-commercial watercraft*	*May not deny or cancel based solely on credit report. May not consider medical information. May not consider absence of credit history.* (some of NCOIL model)
				HB 2467 pending (2003) **DIED**	*Auto, homeowners, farm/ranch, non-commercial watercraft, snowmobile, RVs*	*May not use credit history to unfairly discriminate; list of factors may not consider. Disclosures required*
				SB 400 pending (2003) **DIED**	*Auto, homeowners*	*May not use underwriting guideline based in whole or in part on credit score.*

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UT	No provision			§ 31A-22-1307	Homeowners liability	Insurer that uses credit reports in underwriting must comply with federal Consumer Credit Reporting Act.
				§ 31A-22-320	Auto	May only use credit information to reduce rates or in conjunction with other factors.
				Reg. R590-219-1 to 590-219-8	Private passenger auto	Inform consumer of factors used in adverse underwriting decision. May not use credit information to cancel or nonrenew coverage that has been in place 60 days or more or as the primary reason to refuse to issue a new policy.

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USE OF CREDIT REPORTS/SCORING IN UNDERWRITING

11/03

STATE	INDIRECT REGULATION OF CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS	SPECIFIC REFERENCE TO CREDIT REPORTS	LINE OF BUSINESS	SUMMARY OF PROVISIONS
VT	tit. 8 § 4724	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	*HB 186 pending (2003) (Carries over to 2004)*	*Personal lines*	*May not take an adverse action based on information in a credit report unless can demonstrate the criterion increases the risk of loss. Disclosure rules.*
				SB 77 pending (2003) (Carries over to 2004)	*Credit reporting agencies*	*Must explain credit scores and key factors that make up the score.*

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VA	§ 38.2-508	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§§ 38.2-2114, 38.2-2212	Auto, fire	Insurers shall not refuse to renew an insurance policy solely based on credit information contained in a consumer report, bearing on an individual's creditworthiness, credit standing or credit capacity unless the insurer includes a statement informing the insured of the reasons for nonrenewal.
				Administrative Letter 2002-6	All lines	Any insurer intending to use credit score must file the model prior to their use.

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				SB 1284 (2003) (Codified as §§ 38.2-2126 and 38.2-2234)	Homeowners, renters, auto	May not include income, gender, race, religion, marital status, ZIP code, nationality, etc. as factors. May not base rates solely on credit score or consider absence of a credit history. Must recalculate credit score after 3 years. May not consider medical history codes. File scoring models with department. *(NCOIL* model)
WA	No provision			§ 19.182.020	All lines	Consumer reporting agency may furnish credit report where the insurer intends to use it for underwriting.

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				§ 19.182.040	Life	May use credit report in underwriting life insurance expected to amount to $50,000 or more.
				§ 48.18.545	All lines of personal insurance	Credit history may not be used to cancel or nonrenew insurance. May only be used to deny coverage if combined with other substantive underwriting factors.
				§ 48.19.035	All lines of personal insurance	Credit history shall not be used to determine insurance rates unless the credit scoring models are filed with the commissioner. May not use certain attributes of credit history in credit scoring model.

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				Reg. 284-24A-001 to 284-24A-065	All lines of personal insurance	Regulation describes standards that apply to insurers that use credit history.
WV	§ 33-11-4	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	§ 91-8-3	Auto	Dept. of Motor Vehicles may furnish credit information from its files where an insurer intends to use it for underwriting.

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				Informational Letter No. 142 (July 2002)	Personal auto, homeowners, accident and sickness	Guidelines for filings containing credit scoring. Data may not be used in unfairly discriminatory manner. May not be sole basis for deciding whether to write coverage. If used for rating, must recheck scores of policyholders yearly.
				§33-6B-3	Auto	May not decline a policy based on adverse credit report.
				§ 33-17A-6	Property	May not decline a policy based on adverse credit report.
				SB 376 pending (2003) **DIED**	*All lines*	*Insurers must provide free consultation on how to improve a credit score.*

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WI	§ 628.34, Reg. § INS 6.67, 6.68	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	Bulletin dated 6/16/97	Personal auto and homeowners	Can use credit reports but not as the sole reason to refuse, cancel or nonrenew a policy.
				AB 102, SB 39 pending (2003)	*Credit reporting agencies*	*Provide written disclosure to consumers as listed.*
				AB 278 pending (2003)	*Renters and homeowners*	*May not use information in a credit report as a rating factor.*

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WY	§§ 26-13-109, 26-13-112, 26-13-116	All lines	Sections define practices that are unfairly discriminatory. The use of credit reports is not specifically discussed, but if the use of the credit report is not justified, it might be considered unfairly discriminatory.	SF 81 (2003) (Codified as § 26-2-134)	Personal lines, auto, homeowners	Authority to adopt regulation to provide that credit history may not be sole factor and to require disclosures. Protect consumers against unfair discrimination.

This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Every effort has been made to provide correct and accurate summaries to assist the reader in targeting useful information. For further details, the statutes and regulations cited should be consulted.

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